REDACTED-FOR PUBLIC INSPECTION

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<u>VIA HAND DELIVERY</u>

August 31, 2007

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite 5-C327
Washington, DC 20554

Re: Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis,-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97

Dear Secretary Dortch:

Enclosed for filing in the above-referenced proceeding are two copies of the REDACTED version of the Opposition of Affinity Telecom, Inc.; Cavalier Telephone, LLC; CP Telecom, Inc.; Globalcom, Inc.; McLeodUSA Telecommunications Services, Inc.; Integra Telecom, Inc.; and TDS Metrocom, LLC and supporting declarations (collectively "Opposition"). This filing is also being submitted in the Commission's Electronic Comment Filing System (ECFS).

Under separate cover and in accordance with the Second Protective Order in this proceeding,[1] Highly Confidential copies of this Opposition are being submitted to you along with Gary Romondino, Jeremy Miller and Denise Coca of the Wireline Competition Bureau.

Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,

Patrick J. Donovan

Enclosure
cc: Janice Myles (all via e-mail)
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[1] *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Second Protective Order, DA 07-2293, ¶ 14 (rel. June 1, 2007).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petitions of Qwest Corporation	)	
for Forbearance Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and	)	
Seattle Metropolitan Statistical Areas	)	

OPPOSITION
OF
AFFINITY TELECOM, INC.
CAVALIER TELEPHONE, LLC
CP TELECOM, INC.
GLOBALCOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
INTEGRA TELECOM, INC.
TDS METROCOM, LLC

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Dated: August 31, 2007

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SUMMARY

The Commission should take the opportunity presented here to establish a "complete when filed" approach to consideration of BOC forbearance petitions and summarily deny Qwest's Petitions for failure to submit wire center level information. Qwest bears the burden of proof in this proceeding.

In order to reasonably meet statutory forbearance standards, the Commission must (1) consider forbearance at the wire center level, (2) conduct a separate forbearance analysis for each market segment, *viz* mass, SME, and enterprise markets and for each capacity level for which Qwest seeks forbearance; (3) find that sufficient independent facilities-based competition exists in each of the relevant markets which is sufficient to ensure that in the absence of unbundling obligations competition will continue; and (4) find that a viable wholesale market exists on some basis other than an error prone “predictive judgment.”

Qwest's overall showing of competition is incoherent because it relies on a crazy quilt of methodologies and approaches such as "communications connections" in the mass market, revenues in the business market, lines provided by CLECs based on projections from white pages listings, and special access competition by voice grade equivalents, that preclude any reasoned findings of competition. Viewed separately, Qwest's various approaches to measuring competition are flawed and unpersuasive because they, for example, consistently fail to provide wire center evidence of independent facilities-based competition, omit Qwest's own presence in the market, do not account for substitution of broadband lines, double count categories of competitors, and treat estimates of future competition as actual present competition. Qwest has

provided no evidence of actual wire center "coverage" or provision of service by cable operators in the mass, SME, or enterprise markets.

Independent evidence shows that Qwest does not face sufficient competition to warrant forbearance. A survey by Integra Telecom, Inc. shows that there are rarely competitive last mile alternatives in buildings in which Integra has customers. This is consistent with the recent GAO Report showing that ILECs control the vast majority of access lines to buildings, as well as the Commission's own *Local Competition Reports* that show that Qwest controls the great majority of retails lines in states in its region. Evidence and Declarations submitted in this and other proceedings, and the Commission's findings in the *TRRO* show that competitors are rarely able to construct their own last mile loops. A further study by Integra Telecom, Inc. of customer churn shows that cable is not a significant competitive presence.

The Commission may not make a "predictive judgment" that Qwest would make reasonable wholesale offerings in the absence of unbundling obligations in light of the lack of record evidence of independent facilities-based competition or wholesale providers. In addition, Qwest has conclusively refused to negotiate wholesale pricing for voice grade, DS1 and DS3 loops and transport in Omaha proving that the Commission's "predictive judgment" for that market was erroneous.

Because there is insufficient competition to constrain Qwest's anticompetitive conduct, the Commission may not make the requisite findings that regulation is unnecessary to assure reasonable prices, terms, and conditions or to protect consumer or that forbearance would serve the public interest.

Forbearance would additionally be unlawful because the Commission may not decouple forbearance from UNE impairment, and because the Commission may not reasonably conclude that unbundling obligations have been "fully implemented."

The Commission should deny the Qwest Petitions.

TABLE OF FREQUENTLY USED SHORT CITATIONS

FCC Decisions

Anchorage Order	*Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, FCC 06-188 (rel. Jan. 30, 2007)
AT&T-BellSouth Merger Order	*AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar. 26, 2007)
Local Competition Order	*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted)
OI&M Forbearance Order	*Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd 23525 (2003)
Omaha Order	*Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) *appeal pending, Time Warner Telecom, et al. v. FCC*, No. 05-4769 (D.C. Cir.)

Special Access NPRM	*Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005).
TRO	*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, 18 FCC Rcd 16978 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004)
TRRO	*Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006)

<u>Other Filings</u>

ACS Petition	Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281 (filed September 30, 2005)

GAO Report	U.S. GENERAL ACCOUNTABILITY OFFICE, REPORT TO THE TO THE CHAIRMAN., COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES - TELECOMMUNICATIONS, "FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006)
McLeodUSA Petition for Modification	Petition of McLeodUSA Telecommunications Services, Inc. for Modification, WC Docket No. 04-223 (filed July 23, 2007)
Petitions	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Denver Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Minneapolis Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Phoenix Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix,

	Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Seattle Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petitions of Qwest Corporation	)	
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in the Denver, Minneapolis-St. Paul, Phoenix and	)	
Seattle Metropolitan Statistical Areas	)	

OPPOSITION OF AFFINITY TELECOM, INC. CAVALIER TELEPHONE, LLC CP TELECOM, INC. GLOBALCOM, INC. MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. INTEGRA TELECOM, INC. TDS METROCOM, LLC

Affinity Telecom, Inc.; Cavalier Telephone, LLC; CP Telecom, Inc.; Globalcom, Inc.; McLeodUSA Telecommunications Services, Inc.; Integra Telecom, Inc.; and TDS Metrocom, LLC (together "Commenters") submit this Opposition to the above-captioned Petitions of Qwest Corporation requesting forbearance from regulatory obligations in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.[1]

[1] *Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas,* Public Notice, DA 07-2291 (rel. June 1, 2007). *Wireline Bureau Grants Extension of Time to File Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, DA 07-3042 (rel. July 6, 2007).

I. THE COMMISSION SHOULD ESTABLISH A "COMPLETE WHEN FILED" POLICY FOR CONSIDERATION OF BOC FORBEARANCE PETITIONS

The Commission should take the opportunity presented by Qwest's Petitions to establish a "complete when filed" policy similar to that established for consideration of BOC section 271 applications for authority to offer interLATA services in a state.[2] That policy required applications to "include all of the factual evidence on which the applicant would have the Commission rely in making its findings."[3] The Commission should only permit Qwest to submit new evidence "solely to rebut arguments made or facts submitted by other commenters," and should be prohibited from making "any part of its initial prima facie showing for the first time in reply comments or in ex parte submissions."[4]

As with Section 271 applications, petitions for forbearance are subject to time sensitive statutory deadlines. Therefore, the Commission's rationale to establish this rule for 271 applications applies equally to forbearance proceedings. As the Commission explained, "it is highly disruptive … to have a record that is constantly evolving."[5] This rationale flows from the princi-

[2] *Updated Filing Requirements for Bell Operating Company Applications under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd 6923, at 3-4 (2001).

[3] *Id*.

[4] *Id*.

[5] *Id*.

ple that the Commission "need not sift pleadings and documents to identify" arguments and facts that are not "stated with clarity."[6]

As explained in the *Omaha Order*, the Commission is "under no statutory obligation to evaluate [the] Petition other than as pled."[7] The Commission should therefore impose the same "complete when filed" standard on forbearance petitions as it did on Section 271 applications.[8]

As discussed in this Opposition, Qwest has omitted essential information on wire center level "coverage" by independent facilities-based providers that the Commission has said is the only basis for Section 251(c)(3) forbearance. Qwest is abusing the Commission's deliberative processes by filing a half-baked case and then hoping that the Commission will shoulder the burden of assembling wire center information for it. This approach makes its initial filing a waste of the Commission's and interested parties' time and resources. The Commission is under no obligation to rule on Qwest's application other than as filed. The Commission should summarily deny the Petitions for failure to submit wire center level information.

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[6] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) *cert. denied*, 409 U.S. 1027 (1972).

[7] *Omaha Order*, ¶ 61 n.161.

[8] Petitions for forbearance should be required to contain all information necessary for the Commission to complete its review or the petition would be subject to dismissal. As with Section 271 applications, petitions for forbearance are subject to a statutory deadline and a complete when filed policy would promote efficient decision making by the Commission and efficient participation by interested parties. As with Section 271 applications, dismissal should be without prejudice, affording the petitioner an opportunity to file a more complete case in a subsequent petition and thereby restart the statutory clock.

II. QWEST HAS THE BURDEN OF PROOF

Section 10(a) states that the FCC "shall forbear from applying any regulation or any provision [of the Act] … to a telecommunications carrier or telecommunications service" if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[9]

In making the determination under subsection (a)(3), the FCC must "consider whether forbearance from enforcing the provision … will *promote competitive market conditions*, including the extent to which such forbearance will *enhance competition* among providers of telecommunications services."[10] All three prongs of this standard must be afforded a plain meaning interpretation[11] and must be satisfied before the Commission grants a petition for forbearance.

[9] 47 U.S.C. § 160(a)(1)-(3).

[10] *Id.*, § 160(b) (emphasis added); *see also AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (quoting same).

[11] *AT&T v. FCC*, 452 F.3d at 836 (rejecting the Commission's "new rule" that "conflicts with the statute's plain meaning").

The prongs "are conjunctive," meaning that "'[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.'"[12]

As the petitioner, Qwest has the burden of proof in this proceeding and must demonstrate that its forbearance request fully satisfies the statutory standards. The Commission has explained that in "pursuing relief through the vehicle of forbearance … the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[13] A petitioner must present a detailed showing of the services and facilities for which and the statutory and regulatory provisions from which it seeks forbearance.[14]

As explained in succeeding sections of this Opposition, Qwest has failed to meet its burden in numerous respects.

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[12] *In re Core Commu'ns., Inc.*, 455 F.3d 267 (D.C. Cir. 2006), *quoting Cellular Telecomms. & Internet Ass'n v FCC*, 330 F.3d 502, 509 (D.C. Cir. 2001).

[13] *Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order, 18 FCC Rcd 24648, ¶ 24 (2003) (rejecting claim that petitioners' burden in a forbearance petition is "lower" than the burden applicable in a waiver petition); *see also Core*, 455 F.3d at 279 (stating that the FCC found that the Petitioner provided "no evidence" in support of arguments for forbearance); *Policy and Rules Concerning the Interstate Interexchange Marketplace*, Memorandum Opinion and Order, 14 FCC Rcd 391, ¶ 28 (1998) (denying forbearance because "petitioners have not met their burden with respect to the first and second prongs of the forbearance standard."); *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 as Amended*, Memorandum Opinion and Order, 15 FCC Rcd 7066, ¶ 7 (petitioner "must explain" benefits of forbearance).

[14] *Omaha Order*, ¶ 16 (rejecting forbearance request because the Petitioner failed to identify specific regulations or to explain how they meet certain section 10 criteria).

III. THE COMMISSION MUST APPLY FORBEARANCE STANDARDS THAT REASONABLY IMPLEMENT THE ACT

As noted, forbearance under Section 10(a) is only appropriate if the petitioner can demonstrate that a regulation or provision of the Act is no longer "necessary to ensure that the charges … for [its] … telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[15] The Commission may grant forbearance only where forbearance "will promote competitive market conditions."[16] The Commission's forbearance analysis must "includ[e] the extent to which such forbearance will enhance competition among providers of telecommunications services."[17]

As explained in more detail below, in order to reasonably meet these statutory requirements, the Commission must (1) consider forbearance at the wire center level, (2) conduct a separate forbearance analysis for each market segment, *viz* mass, small business, and enterprise markets and for each capacity level – DS0, DS1, and DS3 – for which Qwest seeks forbearance; (3) find that sufficient independent facilities-based competition exists in each of the relevant markets which is sufficient to ensure that in the absence of unbundling obligations competition will continue;[18] and (4) find that a viable wholesale market exists on some basis other than an error prone "predictive judgment."

[15] 47 U.S.C. § 160(a)(1).

[16] *Id*., § 160(b).

[17] *Id*.

[18] *Omaha Order*, ¶ 1; *Anchorage Order*, ¶¶ 27-30.

Wire Center Level Analysis. As the Commission found in the *Omaha Order* and later reiterated in the *Anchorage Order*, "it is appropriate for [the Commission] to use the wire center service area as the relevant geographic market."[19] Thus, the Commission should exercise its authority to forbear from Section 251(c)(3) *only* when, and to the extent, that a Petitioner has provided sufficient, probative evidence on a wire center basis. The Commission has already "considered and rejected the idea of measuring facilities-based coverage on an MSA basis" in this context, and found that "[u]sing such a broad geographic region would not allow [the Commission] to determine precisely where facilities-based competition exists, which are the only locations in which [it has] determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obligations."[20] Forbearance from such obligations is only appropriate "when the evidence … is presented on a basis that allows [the Commission], in an administrable fashion and consistent with the Commission's precedent, to make findings on a wire center basis"[21] as it did in the *TRRO*.[22]

Accordingly, the Commission must assess Qwest's Petitions using a geographic market that is no broader than individual wire centers. However, as discussed later in these comments,

[19] *Omaha Order*, ¶¶ 61-62; *Anchorage Order*, ¶ 14.

[20] *Omaha Order*, n.186; *see also Anchorage Order*, ¶ 15.

[21] *Omaha Order*, n.61.

[22] *TRRO*, ¶ 82 (rejecting proposals that conclusions be made on an MSA basis), ¶ 87 (basing transport impairment on a wire center-based test), ¶ 155 (finding that the geographic area served by a wire center is the appropriate geographic market to determine impairment), ¶ 164 (rejecting proposals that impairment of high-capacity loops be determined based on MSAs).

Qwest has failed to submit any wire center level information concerning independent facilities-based providers in any of the MSAs for which it seeks forbearance.

Market Segment Analysis. The Commission has previously found that the best method of analyzing a forbearance request is to conduct a product-specific analysis, including separate analyses by loop type[23] and by determining the extent to which competitors can provide services that are "substitutes" for such individual services, *e.g.*, DS0, DS1 and DS3 services.[24] In both the *Omaha Order* and *Anchorage Order,* despite these findings, the Commission relied on measures of competitive entry that looked at conflated product markets in the aggregate and ignored significant distinctions between them.[25] In both decisions, the Commission relied on aggregate information concerning cable coverage for residential and business customers.[26] Aggregate data across product markets offers no basis for granting forbearance because competition and facilities coverage varies between product markets even within a single wire center. Relying on aggregate information that cuts across all market segments and capacity levels carries a high risk of erroneous findings of the extent to which Qwest faces independent facilities-based competition. Most importantly, the level of competitive supply of independent loops and transport will vary according to the capacity of facilities. Accordingly, to adequately "determine "the extent to

[23] *Anchorage Order,* ¶ 13.

[24] *Omaha Order,* ¶ 65.

[25] *Omaha Order,* ¶¶ 65-72; *Anchorage Order,* ¶ 27-38. In Anchorage, the Commission did not consider specific substitutes to ACS's high-capacity services because there was "limited demand" for such services in the Anchorage market. *Anchorage Order*, ¶ 36.

[26] *Omaha Order,* ¶ 69; *Anchorage Order,* ¶ 21.

which ... forbearance will enhance competition"[27] the Commission must conduct a separate analysis of the extent to which forbearance would impact competition for each market segment, *i.e.*, mass market, SME, and enterprise, and for each transport or "loop type", *i.e.*, DS0, DS1 and DS3.[28]

With respect to business customers, it is particularly important that the Commission separately analyze the SME business market segment. BOCs have not provided, and are not able to provide efficiently, a level of attention and quality of service that best serves SME business customers. CLECs, on the other hand, are able to provide these customers service features, quality, and customer care levels that BOCs are only motivated and able to provide to their largest customers. Marketing differences, customer size, capacities of service, and customer needs qualify the SME as a separate market segment. These differences, in turn, require separate consideration with respect to the SME market of each of the factors that the Commission may consider in its forbearance analysis.

There is a long list of CLECs that focus exclusively on the SME market segment, as distinct from the mass market. Because they rely heavily on UNEs and provide customers a quality and level of service at affordable prices that BOCs are not able to provide , the impact of an erroneous, overbroad forbearance decision would be particularly harmful to competition and consumers in this specific market segment. Section 10(b)'s requirement that the Commission

[27] 47 U.S.C. § 160(b).

[28] *TRRO*, ¶ 210.

consider whether forbearance would promote competition mandates that the Commission conduct a separate forbearance analysis for the SME market in addition to other market segments. An analysis along the lines of *Omaha* and *Anchorage* that assumes that some facilities coverage in a wire center applies to all market segments thwarts forbearance standards.

Proven Extensive Independent Last Mile "Coverage." The telecommunications industry is characterized by extremely high barriers to entry which include high fixed and sunk costs, network effects, and economies of scale.[29] A competitor will be able to compete for customers with the ILEC[30] only if it has invested a substantial amount of its own resources to overcome these high barriers to entry and can use its own network to support last mile coverage so that "all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates."[31]

In both the *Omaha* and *Anchorage Orders*, the Commission granted forbearance only in areas in which at least one competitor was offering its own extensive last mile facilities, finding that granting forbearance in areas, "where no competitive carrier has constructed substantial competing 'last mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition."[32]

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[29] *See, e.g., TRO*, ¶¶ 85-91; *Anchorage Order*, ¶ 31.

[30] *Anchorage Order*, ¶ 31.

[31] *Omaha Order*, ¶ 69.

[32] *Omaha Order*, ¶¶ 59-60; *see also Anchorage Order*, ¶ 31.

In determining whether there is substantial competition within last mile facilities, the Commission must look to see if any intermodal competitor, "uses its own network, including its own loop facilities, through which it is willing, and able, within a commercially reasonably time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings."[33] A showing of competitive investment in last mile facilities alone is not enough to justify forbearance of the requirements of Section 10. There must also be evidence that the competitor is winning market share and is actually providing services over its own network to customers.[34]

Under this standard, showings of competition based on use of Qwest facilities cannot justify forbearance. As the Commission has previously found, despite the seeming appearance of competition within a wire center, if those competitors are reliant on an ILECs wholesale components, competition does not truly exist.[35]

Accordingly, the Commission must conduct its forbearance analysis of the Qwest Petitions in a manner that will ensure that facilities-based competitor's end user connections, or last-mile "coverage," is ubiquitous enough to allow competition to exist in the relevant wire centers even if Qwest is relieved of its unbundling obligations. A pervasive flaw in Qwest's Petitions is that they rely primarily on the existence of competitors that continue to depend on Qwest last

[33] *Omaha Order*, n.156; *see also Anchorage Order*, ¶ 32.

[34] *Omaha Order*, ¶ 64, n.177; ¶ 69, *Anchorage Order*, ¶ 28.

[35] *Anchorage Order*, ¶ 30; *Omaha Order*, n.105.

mile connections to reach customers. Qwest cannot show the existence of ubiquitous independent last mile connections, because for the vast majority of locations they do not exist.

A Viable Wholesale Market. The Commission must not only examine the status of competition in the retail market, but also the role of the wholesale market at the wire center level.[36] The Commission found in the *Omaha Order* that facilities-based wholesale competition "minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct."[37] The Commission must find that sufficient competition exists to ensure that the ILEC will continue to offer loops and transport that competitors may not duplicate at wholesale on terms and conditions that will permit competition. The record must support the conclusion that the ILEC has "very strong market incentives" to continue offering loops and transport on a wholesale basis to competitors on reasonable terms and conditions that would permit competition despite the elimination of UNEs.[38] This very strong incentive will not exist unless there is an independent facilities-based provider of loops that could absorb retail customers that could migrate off Qwest's network if Qwest fails to make reasonable wholesale offerings.[39] Without such a competitive showing, and in the absence of the regulatory necessity to do so, there is no incentive for Qwest to offer its own last mile facilities at competitive rates and terms—as has already been

[36] *Anchorage Order*, ¶ 10.

[37] *Omaha Order*, ¶ 71.

[38] *Omaha Order*, ¶ 81; *Anchorage Order*, ¶¶ 39-42.

[39] *Omaha Order*, ¶ 81.

proven in Omaha.[40] In this case, because Qwest has not shown significant independent facilities-based competition for DS0, DS1 and DS3 services, the Commission cannot find that Qwest has strong incentives to make reasonable wholesale offerings. In addition, the Commission's "predictive judgment" in the *Omaha Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous.

IV. QWEST'S PETITIONS FAIL TO SHOW A COMPETITIVE MARKET SUFFICIENT TO JUSTIFY FORBEARANCE

Qwest's Petitions must be denied because its showing of competition is so internally inconsistent, unexplained, incomplete, and fails to meet forbearance standards in numerous respects that it would be impossible for the Commission to conclude that Qwest has met the thresholds for forbearance established in the *Omaha Order* and followed in the *Anchorage Order* - loss of **** Begin Confidential** % **End Confidential **** market share and 75% "coverage" by - an independent facilities-based provider.[41] As shown in Section V of this Opposition, independent evidence contradicts and invalidates Qwest's showing of competition in any event.

A. Qwest's Overall Approach Is Incoherent

Rather than provide cable company market penetration in the telecommunications market for each of the MSAs impacted by its petitions - which the Commission considered in its *Omaha* and *Anchorage Orders*,[42] Qwest attempts to show competition using a crazy quilt of inconsistent

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[40] McLeodUSA Petition for Modification at 4-12.

[41] *Omaha Order*, ¶ 28.

[42] *Omaha Order*, ¶ 66; *Anchorage Order*, ¶ 28.

methodologies and approaches that precludes any findings about competition in the MSAs. Qwest uses "communications connections,"[43] an approach invented by a consultant, to show Qwest's share of the residential market, but uses revenue share based on a customer survey by the same consultant to estimate its share of the enterprise market.[44] When it comes to estimating the level of competition provided by CLECs, Qwest discards "connections" and revenues in favor of lines, this time estimated based on yet another methodology -- projections from its own white pages listings. For competition provided by competitors using special access Qwest shifts again, this time to voice grade equivalents. Competitive fiber is estimated not by lines, connections, or revenues, but route miles. For wireless service, Qwest jettisons all the previous methodologies and relies in part on the number of "adults" that have "cut the cord."

Although the test adopted by the Commission in the *Omaha Order* for forbearance from unbundling obligations was "coverage" by an independent facilities-based provider, Qwest offers a "little bit of this, little bit of that" approach that includes everything *but* a consistent and complete approach that could possibly create a basis for making any findings concerning market share or wire center "coverage." Significantly, Qwest has not attempted to explain why it jumps from one methodology and level of data to another or why it has not provided the simple information that the *Omaha Order* requires. The answer is that Qwest is picking and choosing

[43] Denver Petition at 18; Minneapolis Petition at 19; Phoenix Petition at 18; Seattle Petition at 19.

[44] Denver Petition at 27; Minneapolis Petition at 28; Phoenix Petition at 28; Seattle Petition at 27.

methodologies in an attempt to mask the essential lack of a sufficient showing of independent facilities-based competition.

Qwest's showing is characterized by a number of persistent flaws and weaknesses throughout each of its Petitions. Qwest does not provide wire center level information, but relies variously on MSA, state, or nationwide data without any rhyme or reason. As pointed out in the attached Declaration of Economics and Technology, Inc. ("ETI"), in most cases Qwest fails to account for its own role as the underlying provider of services on which competitors depend to provide service.[45] Qwest additionally conflates lines served with projections of future competition as if projections were current competitive lines.

Qwest's flawed, confusing, and unexplained overall approach to estimating competition confounds any reasoned conclusions based on its Petitions as to the state of competition in the MSAs in question. It would be fundamentally irrational and unlawful for the Commission to rely on this showing to demonstrate or estimate competition, market share, or "coverage" at the MSA or any geographic market level. The Commission should conclude that the overall analytical weakness of Qwest's showing precludes any serious consideration of Qwest's Petitions.

As discussed further below, Qwest's various approaches to estimating competition are additionally flawed even when viewed individually with respect to separate market segments.

[45] ETI Declaration at ¶ 15.

B. Qwest Has Not Presented Any Wire Center Level Evidence of "Coverage" By Independent Facilities-Based Competitors

In the *Omaha Order,* the Commission *denied* Qwest's request for forbearance from § 251(c)(3) loop and transport unbundling obligations throughout the Omaha MSA.[46] It found that the evidence Qwest presented in its Petition only warranted forbearance "in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a)[]"[47] and therefore only granted forbearance as to particular wire centers where competitors had voice enabled facilities coverage to 75 percent of end users in each wire center.[48]

Thus, the Commission has already considered and rejected Qwest's request that the Commission measure "facilities-based coverage on an MSA basis," and found that "[u]sing such a broad geographic region would not allow [the Commission] to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3)

[46] *Omaha Order*, ¶ 61; *see also Anchorage Order,* ¶ 15 (rejecting "ACS's request that the Commission consider the entire Anchorage study area as the relevant geographic market").

[47] *Omaha Order*, ¶ 61.

[48] In the *Omaha Order*, the Commission granted "Qwest forbearance from obligations to unbundled loops and transport pursuant to section 251(c)(3) in wire centers where Cox's voice-enable cable plan covers at least" 75 percent of "end user locations that are accessible from that wire center." *Omaha Order*, ¶ 62. Likewise, in the *Anchorage Order*, the Commission gave significant weight to the fact that in the 5 wire centers where it granted forbearance, GCI had "voice-enabled cable plant" to at least 75 percent of "the end user locations that are accessible from those wire centers." *Anchorage Order*, ¶ 21.

unbundling obligations."[49] Forbearance from these obligations would only be appropriate "when the evidence … *is presented* on a basis that allows [the Commission], *in an administrable fashion and consistent with the Commission's precedent*, to make findings on a wire center basis"[50] as it did in the *TRRO*.[51]

Qwest ignores the requirements of the *Omaha Order* by failing to offer <u>any</u> analysis of independent facilities-based competition on a wire center basis. It does not provide the actual geographic locations of loop and transport facilities competitors have deployed by wire center or evidence that competitors have sufficient coverage in each or any of the wire centers in each of the four MSAs.[52] Qwest does provide the "highly confidential" number of lines in each wire center served by competitors that use various Qwest services such as UNEs, Section 251(c)(4) resale, and so-called "commercially negotiated" UNE-P replacement products QPP/QLS broken down for the residential and business market segments, but this does not show the existence of any independent last mile facilities as envisioned by the *Omaha Order*. This wire center information is completely irrelevant to showing facilities-based competition at the wire center level.

[49] *Omaha Order*, n.186; *see also Anchorage Order*, ¶ 15.

[50] *Omaha Order*, n.61 (emphasis added).

[51] *TRRO*, ¶ 82 (rejecting proposals that conclusions be made on an MSA basis), ¶ 87 (basing transport impairment on a wire center-based test), ¶ 155 (finding that the geographic area served by a wire center is the appropriate geographic market to determine impairment), ¶ 164 (rejecting proposals that impairment of high-capacity loops be determined based on MSAs).

[52] Qwest has provided maps to show the extent of competitive CLEC facilities throughout each of the MSAs, *see, e.g.*, Phoenix Petition at Confidential Exhibit 4. However, Qwest does provide show information on a wire center basis nor does it provide the extent of actual competitive facilities *to end users* in each of the wire centers.

Although Qwest states that cable operators networks in the MSAs overlap with wire centers that account for high percentages of its residential and business lines, this does not identify these wire centers. Even assuming that cable plant provides a telecommunications capability, which is not the case, it could be that large percentages of Qwest's customers could be in a few wire centers in these MSAs and that in areas served by most wire centers there is no cable plant capable of providing telecommunications service.

If for no other reason, the Commission therefore should, as noted, summarily deny Qwest's Petitions for unbundling relief, especially since the Commission is "under no statutory obligation to evaluate [a] Petition other than as pled."[53] While "sections 10(a) and 10(c) each provide … sufficient authority to grant [a] Petition in part — that is, [with respect to 251(c)(3) loop and transport forbearance requests] only in certain wire centers,"[54] the Commission will exercise this authority only when the Petitioner provides evidence on a wire center basis in the Petition.[55] Qwest has not done so, which is fatal to its request.

C. Qwest's Presentation of Competition in the Mass Market Is Unpersuasive

Qwest's showing of competition in the residential market consists of assertions of residential line loss in comparison to growth in households; estimates of "communications connec-

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53 *Omaha Order*, n.161.

54 *Id*. (citing 47 U.S.C. § 160(a) (granting the Commission forbearance authority independent of a filed petition), (c) (authorizing the Commission to grant to grant or deny a forbearance petition in whole or in part)).

55 *Id*., n.186.

tions;" statements concerning the offering or availability of services from cable operators; the availability of Qwest wholesale alternatives; assertions about the number of CLECs operating in the MSA; and non-MSA specific generalized information about VoIP and wireless services. Although when viewed together this *pot pourri* of approaches to measuring competition is incoherent, each showing is unpersuasive individually and as a whole for a number of reasons as well.

Loss of Retail Lines. Qwest contends that it has lost significant residential retail lines. It claims, for example, that its residential switched access lines in Phoenix have declined from **** Begin Confidential** in 2000 to in 2006, or % **End Confidential ****.[56] It attributes this loss to a wide and growing availability of cable telephony as well as other alternatives including VoIP and wireless service. Moreover, according to Qwest, these losses have occurred against the backdrop of growth in households.

As pointed out in the attached declaration of ETI, Qwest's analysis fails to account for substitution of broadband service obtained from Qwest for its customers' second lines.[57] As explained there, as of 2000 up to one-fifth of residential access lines in service were secondary lines. By 2005, secondary lines had dropped by 50%, while broadband access lines substantially increased. In each of the four states in which Qwest seeks forbearance, the increase in broadband lines significantly exceeded the drop-off in ILEC dial-tone lines. Accordingly, without account-

[56] Phoenix Petition at 17.

[57] ETI Declaration, ¶ 18.

ing for second line substitution, Qwest's line loss counts in the residential market are meaningless in terms of measuring competition.

Qwest's residential line loss information is also unpersuasive, because it does not show the extent to which these lost retail lines are served by competitors using Qwest facilities. Over-the-top VoIP providers may be providing service over Qwest DSL service subscribed to by the end user. Some of Qwest's lost retail lines may merely have been lost to CLECs that provide service via Qwest's wholesale services. Because Qwest has not provided the number of retail lines lost to providers that continue to be dependent on Qwest facilities, its statements of retail line losses do not show independent facilities-based competition.

Qwest's statements about household growth are also misleading because household growth may be occurring to a significant extent in greenfield developments that were not previously served by any telephone company, especially in areas such as Phoenix. Qwest may be facing no significant independent facilities-based competition outside of greenfield developments. Without wire center information, Qwest's assertions of household growth have no probative value concerning the extent of independent facilities-based competition.

<u>CLECs Operating in the MSAs</u>. Although Qwest claims that there are a large number of CLECs providing extensive mass market retail competition in each MSA, according to the way it reports this information, it appears that all of them are providing service either using Qwest UNEs, its UNE-P replacement product, or resale. Thus, while it claims, for example, that over **** Begin Confidential End Confidential **** unaffiliated CLECs are providing service in

Denver, it also claims that **** Begin Confidential End Confidential **** are doing so via resale, **** Begin Confidential End Confidential **** via QPP, and **** Begin Confidential End Confidential **** via UNEs.[58] While it claims that **** Begin Confidential End Confidential **** CLECs are providing service via their own non-Qwest network facilities,[59] this does not imply that these CLECs are not also using Qwest facilities. Thus, Qwest has not shown that there are any CLECs that are able to provide service in any of the MSAs without reliance on Qwest facilities. Nor has it explained where or how it obtained information concerning CLECs and how they provide service. by its own admission, only a small minority of competitive carriers in the subject MSAs do not rely on Qwest's network facilities to provide service.

To estimate the number of CLEC in-service residential access lines Qwest reasons that since its internal data shows that about 75% of Qwest's residential lines are listed in white pages, that same percentage must therefore hold true for CLEC customers. However, Qwest fails to provide any explanation of how it determined this percentage or why it should be correct for all CLECs. Nor does this unexplained projection show that CLECs are nor reliant on Qwest facilities.

[58] Denver Petition at 9 (**** Begin Confidential** of **End Confidential **** CLECs in the MSA using non-Qwest network facilities to provide service); Minneapolis Petition at ; Phoenix Petition at 9 (**** Begin Confidential** of **End Confidential **** CLECs in the MSA using non-Qwest network facilities to provide service); Seattle Petition at 9 (**** Begin Confidential** of **End Confidential **** CLECs in the MSA using non-Qwest network facilities to provide service).

[59] Denver Petition at 9.

In addition, Qwest admits to using its privileged knowledge of directory listings originated by CLECs on behalf of customers that they serve on a facilities basis – confidential information that Qwest obtains exclusively because of its ILEC status.[60] As such, the use of this information for Qwest's own corporate ends raises concerns under Section 222(b), which prohibits a carrier from using another carrier's proprietary information for any use other than fulfilling the provisioning carrier's service obligations. For this reason, the Commission should decline to consider this information in this proceeding.

Wireless. Qwest states that wireless service in the MSAs is extensive, that in some of the MSAs, *e.g.*, Minnesota, the number of wireless lines exceeds the total number of CLEC and Qwest lines, and that substantial numbers of customers are "cutting the cord" to rely exclusively on wireless service.[61] It contends that the *AT&T/BellSouth Merger Order* included wireless in the product market for local services to the extent customers rely on mobile wireless as a substitute for wireline service.[62] Qwest contends that wireless service competition alone is sufficient to ensure that market forces will protect the interests of consumers even if the Commission forbears from unbundling obligations.[63]

General wireless penetration data of the type that Qwest has provided does not support forbearance. In the *Omaha Order*, the Commission found that:

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[60] *Id*.

[61] Minnesota Petition at 12-13.

[62] *AT&T-BellSouth Merger Order*, ¶ 96.

[63] Minnesota Petition at 14.

> Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and *because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless* and interconnected VoIP services to rationalize forbearance from unbundling obligations.[64]

The Commission made a similar finding in the *Anchorage Order,* noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area.[65] These conclusions are fully controlling here because Qwest has failed to offer anything different than what it offered with respect to Omaha.

None of Qwest's wireless information provided on a wire center basis. In addition, as noted in the attached declaration of ETI, wireless service should not be counted as an intermodal competitor because major wireless carriers remain heavily dependent on ILEC special access and transport services.[66] Further, Qwest has not shown that wireless is a genuine substitute for wireline service. Its own data shows that only a small minority of customers have "cut the cord"; for example, only 11.3% of households in the Denver area.[67] In addition, at the present time, wireless service does not provide comparable, or in some cases any, broadband access to the

[64] *Omaha Order*, ¶ 72.

[65] *Anchorage Order,* ¶ 29.

[66] ETI Declaration, ¶¶ 15, 29; *see also* Declaration of Gary B. Lindsey, Director of Access Solutions, Sprint Nextel Corp., ¶ 6 (Aug. 8, 2007) *filed as an attachment to* Comments of Sprint Nextel Corp., WC Docket No. 05-25 (filed Aug. 8, 2007).

[67] Denver Petition at 11. *See also* Minneapolis Petition at 12, Phoenix Petition at 11, Seattle Petition at 11.

Internet. At most, therefore, wireless continues to be a complement to wireline service, not a substitute for it.[68] If wireless is not a complete substitute for landline service, there is no basis for the Commission to find that the availability of wireless service is sufficient to protect consumers in the absence of unbundling obligations.

Qwest has also overstated the Commission's conclusions with respect to wireless in the *AT&T/BellSouth Merger Order*. For purposes of consideration of adverse impacts of that merger, the Commission included wireless in the local service market "when it is used as a complete substitute for all of consumer's voice communications needs."[69] Consideration of whether a merger will unduly concentrate or otherwise harm the local telecommunications market is not the same as a forbearance analysis. Further, for the reasons stated, Qwest has not shown that wireless is anything more than a complementary service.

Accordingly, the Commission should conclude that wireless has no relevance to its forbearance analysis for the mass market.

Interconnected VoIP Providers. According to Qwest, it is experiencing a significant intermodal threat from VoIP services. It contends that because customers can, and, according to Qwest, seemingly are, subscribing to packages of services including wireline services, wireless and/or broadband Internet access, these customers have the ability to shift usage among these

[68] *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2 ("Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce chum, rather than the next leg in the company's growth.").

[69] *AT&T/BellSouth Merger Order*, ¶ 95.

three services in response to price changes from any one service.[70] Qwest asserts that because consumers have "all you can eat" pricing with these bundles, the enforcement of unbundling is not necessary to ensure that charges remain just and reasonable, and not unjustly discriminatory.[71] Consistent with its deficient analysis as a whole, Qwest uses general, MSA-wide statistics and general nationwide observations from industry analysts to support its claims concerning interconnected VoIP services.[72] Additionally, Qwest uses data regarding general market investment which shows a *potential* increase in VoIP market share to support its argument that it is already losing customers to competition.[73] Qwest asserts that as the number of broadband lines have increased and that "[e]ach broadband customer represents a *potential* VoIP subscriber."[74] Qwest contends that this growth could theoretically take business away from Qwest's wireline services.

Qwest's submission concerning VoIP simply repeats claims the Commission expressly rejected in both the *Omaha* and *Anchorage Orders*. In the *Omaha Order*, the Commission found, among other things, that because Qwest had not submitted sufficient data showing how VoIP is a substitute for § 251(c)(3) loop and transport facilities, it did not rely on "intermodal competition from … interconnected VoIP services to rationalize forbearance from unbundling

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[70] *See, e.g.*, Denver Petition at 19.

[71] *See, e.g., id.*

[72] *See, e.g., id*. at 7-8, 14-15.

[73] *See, e.g., id.*

[74] *See, e.g., id*. at 15.

obligations."[75] In addition, the Commission has repeatedly and correctly held that intermodal competition from VoIP providers is not a significant source of competitive restraint on traditional ILEC wireline services nor could it be deemed an equivalent substitute to an ILEC's wireline service.[76]

Just as Qwest and ACS failed to demonstrate in Omaha and Anchorage, respectively,[77] Qwest now fails again to demonstrate that consumers in the relevant markets are substituting either cable or VoIP services for its traditional wireline service. Indeed, Qwest mustered similar arguments in its previous Petitions[78] and made the same argument with respect to VoIP that customers with *access* to a broadband connection could readily switch to a VoIP provider at some point in the future.[79] ACS made similar arguments.[80] The *Omaha Order* found these

[75] *Omaha Order*, ¶ 72; *see also Anchorage Order*, ¶ 29 (concluding that "we do not include competition from wireless and interconnected VoIP services in [the] market analysis") .

[76] *See, e.g., TRRO*, n.118 & ¶ 193 n.508; *TRO*, ¶ 230.

[77] *Omaha Order*, ¶ 72; *Anchorage Order*, ¶ 29.

[78] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, at 9 (filed June 21, 2004).

[79] *Id.* at 12.

[80] Petition for Forbearance of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Docket No. 05-281, at 16-19 (filed Sep. 30, 2005).

arguments insufficient to "rationalize forbearance from unbundling obligations."[81] The *Anchorage Order* also rejected these arguments.[82]

Similarly, the Commission in the *TRRO* dismissed arguments by Verizon and SBC that the existence of intermodal competition from VoIP providers justified denial of access to UNEs for the provision of local exchange service.[83] The Commission found that broadband service, which is the essential underpinning to VoIP service, was not ubiquitous enough for VoIP to threaten wireline service.[84] It properly concluded that within the existing broadband market, DSL customers view VoIP service as a supplement to, rather than a replacement for, wireline service because DSL requires an existing wireline connection.[85] It therefore held that VoIP should not be viewed as "a substitute for wireline telephony."[86] The Commission observed that granting forbearance from § 251(c)(3) unbundled loop obligations may restrict some carriers from participating in the broadband market in each of the MSAs, so it could adversely affect the availability of VoIP services as well. Consistent with its prior decisions, the Commission should decline to consider intermodal competition from interconnected VoIP services as providing significant competition. Cable Operators. In the *Omaha* and *Anchorage Orders*, the Commission granted

[81] *Omaha Order*, ¶ 72.

[82] *Anchorage Order*, ¶ 29 & n.90 (rejecting ACS's reliance "upon general statements by industry analysts").

[83] *TRRO*, at n.118.

[84] *Id*.

[85] *Id*.

[86] *Id*.

limited forbearance based on the extensive presence of cable as a facilities-based competitor. Here, Qwest provides little factual information about the state of cable mass market competition in the MSAs generally, and more importantly, provides no information at all on a wire center basis for any of the MSAs. Although it states, for example, that, as of December 2006, Comcast was servicing a geographic area that encompassed multiple Qwest wire centers that account for over ****Begin Confidential** % **End Confidential **** of the Qwest retail residential lines in the Minneapolis-St. Paul MSA,[87] this does not show the location or "coverage" in any wire center of cable facilities that might constitute independent facilities-based competition. And, as explained in the attached declaration of ETI, even where the cable providers appear to cover a majority of an MSA, cable providers remain at a significant disadvantage in terms of providing facilities-based competition because they lack Qwest's incumbency status in telephony.[88] Qwest says absolutely nothing about cable market share, lines served, or facilities presence within any wire center.[89]

[87] *See* Minneapolis Petition at 7. Qwest makes similar far-reaching statements regarding the geographic areas served by cable companies in the Seattle, Phoenix, and Denver MSAs. *See* Seattle Petition at 7 (claiming that Comcast is serving an area accounting for **** Begin Confidential** % **End Confidential **** of Qwest's residential retail lines); Phoenix Petition at 7 (claiming that Cox is serving an area accounting for **** Begin Confidential** % **End Confidential **** of Qwest's residential retail lines); Denver Petition at 7 (claiming that Comcast and Millennium are serving areas accounting for **** Begin Confidential** % **End Confidential **** of Qwest's residential retail lines).

[88] *See* ETI Declaration, ¶ 30.

[89] Qwest briefly mentions that Mediacom, Charter, and US Cable each serve some customers in the Minneapolis-St. Paul MSA without providing any data regarding penetration or whether these companies rely on Qwest's network elements for provision of their services. *See*

Furthermore, Qwest appears to equate the number of homes passed in each of the MSAs with an immediate ability to provide voice services throughout all of the MSA. For example, Qwest simply states that Comcast already passes 1.2 million homes in the Minneapolis-St. Paul MSA, and that if Comcast achieves its goal of 20% digital voice customer penetration level by 2009, "this would equate to over 200,000 Comcast Digital Voice customers."[90] Qwest's showing for Denver is even less persuasive. Qwest simply cites to the improvements that Comcast has invested in its Denver-area network and to Comcast's announcement that it "would be creating more than 700 new jobs in Colorado" without providing any data on Comcast's current telephony subscribers.[91] While Qwest makes much of the fact that the largest cable provider in each subject MSA may potentially serve a large share of the mass market customers in the MSA, this speculative data by itself is not relevant information. Before the Commission can rely upon Qwest's claims regarding cable competition for mass market telephony services, Qwest must sufficiently demonstrate that: (1) cable providers do not rely materially on Section 251(c)(3) UNEs or other Qwest wholesale facilities in the various wire centers; and (2) each cable provider

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Minneapolis Petition at 9. Qwest also offers no significant or relevant data regarding these cable providers' penetration for telephony services in the mass market on a wire center by wire center basis.

[90] *See* Minneapolis Petition at 7. Qwest also makes wholly irrelevant references to Comcast's potential subscriber growth on a nationwide basis. *See* Minneapolis Petition at 7; Phoenix Petition at 7. These projections prove nothing about the geographic coverage or potential for subscriber or market share increase for telephony within the specific MSA at issue, let alone within the relevant wire centers within those MSAs. The Commission should therefore completely disregard such data.

[91] *See* Denver Petition at 7.

upon which Qwest relies is substantially present in each wire center with its own plant, including facilities and nodes technically able to provide voice-grade services. Qwest has shown neither. Even assuming *arguendo* that the nationwide growth forecasts for Comcast cited by Qwest are reliable and even if the facilities in Seattle, Denver, and Minneapolis are being deployed at approximately the same pace as the nationwide expansion, the forecasts still show that Comcast's VoIP offering (Comcast Digital Voice) is far from fully rolled out.[92]

Accordingly, Qwest has provided no basis for any finding of independent facilities-based competition on a wire center level that could support competition.

Communications Connections. In an effort to show that it has lost market share that might meet the threshold established in the *Omaha Order*, Qwest claims that its share of residential "communications connections" in the MSAs for which it seeks forbearance varies from ** **Begin Confidential** % to % **End Confidential** **.[93] Qwest describes a "communications connection" as any telecommunications service used by a customer including a residential access line, a wireless service, or a broadband Internet line. TNS uses billing information from a sample of customers to calculate total connections and each carriers share of those connections.

This approach to measuring market share in provisions of telecommunications service in the mass market is fatally defective, however, because, as stated by Qwest, it includes information services such as Internet access as a connection. Therefore, the shares cited by Qwest

[92] *See* ETI Declaration, ¶ 30.

[93] Denver Petition at 19; Minneapolis Petition at 19; Phoenix Petition at 18 ; Seattle Petition at 18.

measures in part Qwest's share of the Internet access market which has no bearing on the extent to which Qwest faces competition in provision of telecommunications service. Section 10 concerns forbearance from application of regulatory requirements to a "telecommunications carrier or class of telecommunications service." Therefore, even if it were factually valid, Qwest's connections estimate has no relevance in a Section 10 forbearance analysis.

Moreover, because connections sweeps in a range of new non-telecommunications services that have been growing, decreasing "connection shares" does not show that Qwest is losing share, only that its share of an expanding universe of services may be diluted as customers supplement their wireline services with additional services such as broadband. Further, as discussed in the attached Declaration of ETI, a significant portion of the "connections share" of other providers is likely attributable to family plans for wireless service which make it very affordable for family members, starting at age 12, to have a wireless phone, each counting as a separate connection, even while maintaining their landline.[94] Thus, Qwest has chosen "connections share" rather than a straightforward market share analysis because growth in Internet access service and wireless family plans grossly inflates competitors' share. Qwest cannot cast the availability of new services as a Qwest loss of market share that justifies forbearance of core wireline network services and facilities.

Accordingly, the Commission should reject "communications connections" as having any probative value in measuring competition in the local telecommunications market.

[94] ETI Declaration, ¶ 22.

D. Qwest Has Not Shown Competition in the Enterprise Market

In order to show competition in the enterprise market, Qwest relies on a decline in retail lines, competition by CLECs, provision of service by cable operators and systems integrators, and the deployment of competitive fiber in the MSA. As noted in the attached ETI Declaration, this attempted separate itemization of possible competitive sources is misleading in that they are not separate but overlap. Competitive fiber is not deployed in a vacuum but by providers that fall into other Qwest categories such as CLECs or cable operators. In any event, viewed its categories together or separately, Qwest's showing is unpersuasive as discussed below.

Decline in Qwest's Retail Lines. Qwest claims that its retail business lines have declined and it has a small share of the business market in the MSAs in question. It claims that in Minneapolis, for example, its retail lines declined from **** Begin Confidential** to (%) **End Confidential **** from 2005 to 2006.[95] To estimate its share of the enterprise market, Qwest relies on "revenue share" based on a survey by its consultant TNS. Qwest claims that its revenue share in Minneapolis as of the last quarter of 2006 for the small business market was **** Begin Confidential** % **End Confidential**** for small business and **** Begin Confidential** % **End Confidential **** for the enterprise market. Qwest defines a small business customer as one generating less than $1500 in monthly telecom revenue and an enterprise customer as a customer with more than $1500 in monthly telecom spending.[96]

[95] Minneapolis Petition at 28.

[96] *Id*.

The Commission should reject this revenues showing, first, because although Qwest purports to show a decline in lines, it is obvious that revenues are not lines. A change in revenues may reflect changes in pricing or subscriptions to optional services, as opposed to changes in the number of lines served. The revenues-based approach therefore is unreliable for measuring market share. It also would be irrational to infer substantial facilities-based coverage based on competitors' revenues. A few competitors serving a few very large customers can obtain a very large share of revenues even while the ILEC controls access to the vast majority of customer locations.

In addition, it is unclear whether the revenues measured include broadband service. Since TNS included information services in its "connections" approach for the mass market, it is quite likely that it included Internet access revenues for the enterprise market as well. If so, this would inflate competitors' shares. As explained earlier, growth in broadband and new information services does not translate into a declining market share for Qwest's core telecommunications network services and facilities. Significantly, Qwest has not attempted to justify or explain why revenue share is an appropriate measure of Qwest's position in the business market segment. Qwest does not explain why it did not obtain from its consultant a survey that would show the number of lines served by competitors.

Cable Operators. Qwest's showing of cable competition in the enterprise market offers even less relevant data than its mass market showing. Qwest states that since Comcast and Cox have had success in the mass market in the subject MSAs, Qwest is eligible for forbearance pursuant to the FCC's finding in the *Omaha Order*.[97] Apart from the fact that Qwest has failed to show significant cable competition either on a market share or wire center facilities basis, Qwest fails to demonstrate, that that cable competitors are able – or will be able within a commercially reasonable period of time – to adequately provision high-capacity DS1 and DS3 services to enterprise customers with their current cable plant. Qwest merely reasons that since Comcast and Cox provide mass market offerings, they must possess the "necessary facilities to provide enterprise services."[98]

But this is wrong because a competitor's ability to serve one market segment does not translate to an ability to serve every market segment. Qwest has not shown that cable operators are able to serve the SME or other business market segments even if they might have facilities passing mass market customers in a wire center, although, as discussed, Qwest has not demonstrated "coverage" of the mass market either.

Qwest conveniently ignores problems that are patent to the ability of cable providers to offer services to the enterprise market, such as the lack of physical reach of the cable facilities. Due to this limitation, even cable companies that have deployed some amount of fiber in a particular MSA can only serve those businesses that are in close proximity to its existing infrastructure. As required by the Commission, a more comprehensive and detailed wire center-

[97] *See* Minneapolis Petition at 23; Phoenix Petition at 21; Seattle Petition at 21; Denver Petition at 21.

[98] *See* Minneapolis Petition at 21; Phoenix Petition at 21; Seattle Petition at 21; Denver Petition at 21.

specific analysis is necessary to show if cable operators have plant that could serve enterprise customers anywhere in an MSA. As the Commission recognized in the *Anchorage Order*, General Communications Inc. ("GCI") served enterprise customers' telephony needs using a fiber optic network separate from its cable network, and GCI's fiber optic network "is not deployed as ubiquitously as its cable plant."[99] Thus, the Commission cannot rely on the apparent extent of a cable provider's cable franchise or "homes passed" to determine the potential for the cable provider to provide facilities-based telephony to enterprise customers.

In addition, as the Commission concluded in the *TRRO*, to the extent cable companies serve businesses at all, cable companies focus on selling cable modem services to "home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities."[100] Most businesses thus far have viewed cable modem service as insufficient for their needs, because "bandwidth, security, and other technical limitations on cable modem service render it an imperfect substitute for service provided over DS1 loops."[101] Cable operators are not able to provide multiple lines with hunting over cable plant, an important service for many business customers. By distorting the cable provider's abilities within a market, Qwest demon-

[99] *See Anchorage Order*, n.121. Furthermore, the Commission's *TRRO* found that cable transmission facilities are not used to serve business customers to any significant degree. *See TRRO*, ¶ 193.

[100] *TRRO*, ¶ 193.

[101] *Id*.

strates a thorough misunderstanding of the technical capabilities required for a cable operator to service enterprise customers.

Qwest submits sweeping generalizations about cable providers potential enterprise offerings without any evidence of any cable providers *actual* enterprise offerings in the MSAs at issue. For example, in Minneapolis and Denver, Qwest refers to an announcement that Comcast's "next great business opportunity" is to offer enterprise telephony services, but the cited document actually only describes Comcast's planned future investment over the next 5 years to serve business customers generally.[102] Moreover, nothing in Qwest's Petitions provides evidence that any of these investments will be made in the MSAs at issue, let alone the wire centers which form the relevant geographic markets.

For Qwest to meet Section 10 of the Act's forbearance standard, it must demonstrate that there is *actual* competition, rather than speculative competition. Qwest offers no real evidence that any cable company operating in the MSAs at issue is providing extensive facilities-based telephony services to enterprise customers today, and its assertions regarding the future of cable-based enterprise telephony competition in the subject MSAs are anecdotal at best. Instead, Qwest focuses solely on a cable company's presence in the MSA as "evidence" that these companies "possess[es] the necessary facilities to provide enterprise services."[103] In sharp contrast to the situation considered in the *Omaha Order* in fact, Comcast is in the early stages of offering its

[102] *See* Minneapolis Petition at 23; Denver Petition at 22.

[103] *See, e.g.,* Denver Petition at 22.

enterprise services and that, as of May 2006, it did not even offer voice services to business customers.[104] Comcast further acknowledged that "it does not have a substantial market share in the business area…."[105]

Accordingly, Qwest has failed to show significant cable competition in the enterprise market segment on either a market share or wire center independent facility basis.

Wireline CLECs. Qwest contends that there are a large number of CLECs providing extensive enterprise retail competition in each MSA.[106] It provides the number of business lines being served by CLECs using Section 251(c)(4) resale or QPP/QLS and provides estimates of lines served by CLECs based on projections from the percentage (36%) of its own business lines that are listed in the white pages. Qwest reasons that based on its internal data regarding the percentage of its customers who have white page listings, it can thereby estimate the number of lines serviced by the CLECs. This presumption is flawed because it assumes that CLEC customers in each of the subject MSAs choose to be listed in the white pages at the same rate as Qwest's

[104] *See* Peter Caranicas, *Business Services: Cable's Last Frontier?*, CABLE360.COM (May 1, 2006).

[105] *Id*.

[106] Denver Petition at 22-24; Minneapolis Petition at 23-25; Phoenix Petition at 23-25; Seattle Petition at 22-24.

nationwide customer base.[107] This method is unreliable to determine the number of access lines because businesses may only list a main number, as Qwest concedes.[108]

In addition, as pointed out by the attached ETI Declaration, Qwest double counts competitors.[109] Far from there being numerous different types of competitors, CLECs are frequently fiber providers, fiber collocators, systems integrators, and even wireless providers. Qwest's description of CLECs does not enumerate an additional type of competitors, but merely for all practical purposes duplicates information provided in its descriptions of other alleged types of competitors.

In addition, Qwest has only cited competitors that use Qwest facilities to provide service. Therefore, they do not constitute the independent facilities-based competition that is necessary to support forbearance.

Wireless. Qwest correctly does not contend that wireless provides a competitive alternative in the business market segments. Qwest makes no claim that business customers are "cutting the cord" and switching to wireless instead of wireline services. And, all of the reasons stated above concerning wireless substitution in the mass market are applicable with even greater force to enterprise market segments. Therefore, there is no basis for the Commission on this

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[107] *See* ETI Declaration, ¶¶14-15.

[108] *See* Seattle Petition at 23 n.61; Phoenix Petition at 24 n.57; Denver Petition at 23 n.56; Minneapolis Petition at 24 n.61.

[109] ETI Declaration, ¶ 33.

record to conclude that wireless provides an alternative to Qwest services in any business market segment, including in particular the SME business market segment.

Competitive Fiber. Qwest contends that there are extensive competitive fiber networks in the MSAs in question. It provides the total number of non-Qwest fiber miles in each MSA, states that one or more fiber-based competitor has facilities in a significant percentage of its wire centers that account for a significant percentage of Qwest's residential and business lines in the MSA, names fiber-based providers in the MSA, and attaches a map that purports to show location of competitive fiber in the MSA.[110]

As explained in the attached ETI Declaration, Qwest's statement of total fiber miles and maps provide absolutely no useful information in terms of identifying actual locations of competitive fiber that could provide service to locations in any wire center. Its maps are virtually illegible. None of Qwest's maps show CLEC facilities in any detail within the respective MSAs.[111] The "confidential" maps submitted by Qwest consist of small, nearly illegible drawings which it claims show the "coverage" of competitive fiber throughout the MSA. Because of the scale of the maps, the drawings appear simply as a tangle of lines making it impossible to identify any particular streets or buildings. It is impossible to determine whether any competitor has a relatively comprehensive network or whether the lines represent numerous providers, each of which have small fragments of coverage.

[110] Denver Petition at Confidential Exhibit 4; Minneapolis Petition at Confidential Exhibit 4; Phoenix Petition at Confidential Exhibit 4; Seattle Petition at Confidential Exhibit 4.

[111] ETI Declaration, ¶ 43.

As the Commission found in the *TRRO*, such maps have "little probative value"[112] and their "value … is undermined by several shortcomings."[113] "Due to the wide variability in market characteristics within an MSA," the Commission found that MSA-wide conclusions based on fiber deployment maps "would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy."[114] Indeed, among other things, maps fail to indicate "the capacity of service … along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities."[115] In addition, maps "do not indicate whether carriers operating the fiber depicted are using these facilities to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service."[116] Further, the Commission expressly has rejected the use of fiber-based collocators as providing any probative evidence of whether ILECs should be required on an MSA wide basis to offer unbundled access to loops and transport.[117]

[112] *TRRO*, ¶ 187.

[113] *Id*., n.445.

[114] *Id*., ¶ 82.

[115] *Id*., ¶ 187.

[116] *Id*., ¶ 188.

[117] *See TRO*, ¶ 341 (observing that the test proposed by Verizon "provides little, if any, indication that even [a collocated] competitor has been able to widely, if at all, self-deploy alternative loop facilities in that area" and that even "the presence of a single [C]LEC's collocated transport facility … is not sufficient evidence that facilities-based competitive entry into a market … is economically feasible."); *see also Implementation of the Local Competition Provi-*

Even if the Commission were to accept Qwest's fiber maps as informative, as explained elsewhere in this Opposition, even with this fiber competitive carriers rarely are able to find alternatives to BOC last mile facilities to most customer locations.[118] And even where they have installed fiber rings, they are able to install laterals to buildings in only a narrow range of circumstances as already found by the Commission.[119] Accordingly, Qwest's showing concerning competitive fiber does not support forbearance.

As the attached declaration makes clear, in various recent Commission proceedings where ILECs have produced maps purporting to illustrate that their competitors have extensive facilities within a particular geographic area, what the maps really demonstrated was how dependent most enterprise customers were on ILEC facilities.[120]

Accordingly, Qwest's showing concerning competitive fiber does not support forbearance.

Systems Integrators, IP Enabled Service providers and Other Competitors. Qwest contends that systems integrators and IP enabled service providers are likely to make the enterprise market more competitive.[121] As aptly pointed out in the attached ETI Declaration, systems

sions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 131-32, 3849, ¶ 341 n.673 (1999).

[118] *See, e.g., Omaha Order*, ¶ 67 (concluding that Qwest was the only provider of wholesale access in MSA demonstrating the lack of alternatives to BOC last mile facilities.).

[119] *TRRO*, ¶¶ 149-155.

[120] *See* ETI Declaration, ¶ 41.

[121] Denver Petition at 25.

integrators and IP-enabled providers are not an additional source of competition.[122] Qwest presents them as such, however, in an attempt to mask the fact that systems integrators and IP-enabled providers usually overlap and are the same as other providers such as CLECs and VoIP providers. Nor has Qwest shown that systems integrators and IP-enabled providers are not dependent on Qwest facilities to reach customers in the vast majority of circumstances. Qwest's contentions concerning systems integrators and IP-enabled providers do not provide even one scrap of evidence showing independent facilities-based competition at the wire center or any level that could possibly support forbearance.

E. Qwest Has Not Shown Extensive Independent Last Mile Coverage

In light of the discussion in the preceding section, it is evident that Qwest has failed to show the ubiquitous and extensive independent facilities-based coverage on a wire center, or even an MSA, basis sufficient to warrant forbearance. Most of its showing concerns competitors that use Qwest facilities; wireless is not a substitute for wireline service; and its cable showing consists of little more than statements that cable operators are providing some unspecified level of service in some parts of the MSA. This falls far short of the "coverage" required by the *Omaha* and *Anchorage Orders*. Accordingly, the Petitions may be rejected for this reason alone.

F. Qwest Has Not Shown the Existence of a Viable Wholesale Market

<u>There Is No Viable Current Wholesale Market</u>. In the *Omaha Order,* the Commission found that where there are "very high levels of retail competition that do not rely on Qwest

[122] ETI Declaration, ¶ 33.

facilities -- and for which Qwest receives little to no revenue" Qwest has "the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest."[123] On this basis, the Commission made a "predictive judgment" that Qwest would continue to make wholesale offerings available to competitors even in the absence of Section 251(c)(3) unbundling obligations.

As discussed elsewhere in these comments, Qwest has failed to demonstrate, and independent evidence shows that there are not, very high levels of retail competition that do not rely on Qwest facilities in any of the MSAs that are the subject of Qwest's Petitions. Therefore, Qwest in these MSAs does not have an incentive to make reasonable wholesale offerings to competitors and the Commission may not make a predictive judgment to that effect.

Apart from this, however, there is no basis for a finding of sufficient wholesale offerings by Qwest or others that could warrant a conclusion that transport and last mile connection will be available to competitors on reasonable terms in a forborne environment. With respect to the mass market, Qwest merely provides the numbers of VGE residential lines in each MSA provided by competitors using QPP/QLPS, its UNE-P replacement service, and via Section 251(c)(4) resale.[124] As explained in the attached Declaration of ETI, VGEs do not accurately measure competitive presence because even a few high capacity circuits will inflate the number of

[123] *Omaha Order*, ¶ 67.

[124] Denver Petition at 16; Minneapolis Petition at 17; Phoenix Petition at 16; Seattle Petition at 17.

lines.[125] Qwest does not explain why it does not provide actual lines or why it has used VGEs in the residential market. Therefore, VGEs do not show a significant wholesale market.

Qwest's wholesale showing is also insufficient because it does not allege or show that there any independent facilities-based providers of wholesale services to serve the residential market in the subject MSAs. As the Commission found in its *Anchorage Order* the record does "not reflect any significant alternative sources of wholesale inputs for carriers in the Anchorage study area…[t]hus, continued access to the incumbent's loop facilities is important even in wire centers where there already is extensive competition."[126] Thus, wholesale services provided over Qwest facilities cannot rationally be used to undercut unbundling obligations. As the Commission has explained, "[i]t would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs."[127] Therefore, the Commission may not rely on Qwest wholesale services as a basis for forbearing from Section 251(c)(3) unbundling obligations.

The Commission may also not rely on the availability of either Section 251(c)(4) resale or QPP/QLS either of these services for the additional reason that they are not economically viable alternatives. Carriers use Section 251(c)(4) generally as a backstop to a UNE based

[125] ETI Declaration, ¶ 34.

[126] *Anchorage Order*, ¶ 30.

[127] *TRO*, ¶ 48.

business plan in those situations where it is the only alternative to serve a customer's location such as when UNEs are not available because of "no facilities." QPP/QLS is only used because former UNE-P providers had no alternative after the Commission eliminated UNE-P. QPP/QLS may also not be considered as basis for forbearance because the offering has included § 251(c)(3) UNE loops along with commercial provisions for local switching.[128]

With respect to the business market, Qwest similarly claims that CLECs are providing service to certain numbers of business customers using its QPP/QLS and resale offerings in each of the MSAs.[129] This showing is insufficient for all the reasons states above concerning these offerings.

Qwest also states that CLECs are successfully serving the business market using its special access services.[130] Although the Commission in the *Omaha Order* relied in part on the availability of special access offerings as possibly supporting forbearance (although this factor apparently played a very minor role in the decision),[131] it should not do so here because the Commission has already determined that special access is not a replacement for UNEs for

[128] *See* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President and Chief Technology Officer, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (filed Dec. 15, 2006).

[129] Denver Petition at 22; Minneapolis Petition at 23; Phoenix Petition at 23; Seattle Petition at 23.

[130] Denver Petition at 24; Minneapolis Petition at 24; Phoenix Petition at 24; Seattle Petition at 24.

[131] *Omaha Order*, ¶ 69.

purposes of local service competition because ILECs have the ability to engage in abuses, such as by raising prices, and because special access prices are constrained by the availability of UNEs.[132] Moreover, the Commission has since learned from other agencies that its current rules governing special access are likely flawed.[133] Extensive other information before the Commission shows that the Commission's pricing flexibility rules misidentify competitive areas and have permitted price cap ILECs to raise prices.[134] Accordingly, it would be arbitrary and capricious for the Commission at this point to rely on the availability of special access as a basis for forbearance with respect to the enterprise market.

The Commission May Not Make A "Predictive Judgment." In light of the lack of current viable wholesale alternatives in both the business and residential markets in the subject MSAs the Commission would be left with no more than an error prone "predictive judgment" that Qwest would make reasonable wholesale offerings in the absence of unbundling obligations. But the Commission should not do so in light of experience gained from its "predictive judgment" in Omaha.

Qwest claims that the Commission should grant forbearance from its loop and transport unbundling obligations because it makes "attractive wholesale offerings available" to UNE-

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[132] *TRRO*, ¶ 62.

[133] *See generally*, GAO Report.

[134] Comments of ATX Communications, Inc. et al, WC Docket No. 05-25, RM-10593, filed August 8, 2007, pp. 9116;Reply Comments of 360 Networks (USA), Inc. *et al.*, WC Docket No. 05-25, RM-10593, filed August 15, 2007, pp 2-4.

based carriers in the Minneapolis-St. Paul MSA "even when it has no obligation to do so."[135] In fact, however, since the Commission lifted Qwest's Section 251(c)(3) unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.

As the most impacted CLEC in the Omaha market, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") has made it clear that the forbearance granted to Qwest in the Omaha market has made it extremely difficult for McLeodUSA to remain viable in that market and has severely devalued the investment in its network facilities.[136] Qwest's conduct in the post-forbearance Omaha market plainly contravenes the Commission's prediction that "market incentives" would motivate Qwest to continue to make reasonable wholesale offerings of loops and transport available to competitors notwithstanding forbearance from Section 251(c) UNE obligations.[137] Qwest has likewise failed to comply with its obligation to offer "just and reasonable prices" to competitors under Section 271. Rather than having incentives to set prices at competitive levels, Qwest has been very opportunistic in its pricing decisions in the absence of

[135] Minneapolis Petition at 17.

[136] McLeodUSA has submitted extensive analyses to the Commission regarding Qwest's failure to offer just and reasonable post-forbearance offerings in the Omaha MSA. In the interest of brevity, those previously filed analyses are incorporated herein by reference. *See, e.g.*, McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President and Chief Technology Officer, McLeodUSA Telecommunications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (filed Dec. 15, 2006).

[137] *See Omaha Order*, ¶ 83.

Section 251(c) obligations and has taken advantage of the fact that it is the only wholesale loop provider in Omaha. With respect to McLeodUSA, Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers. Instead, Qwest has only offered to replace high-capacity UNEs with special access services from its FCC Tariff No. 1, at vastly higher rates for both recurring and non-recurring charges.[138] Qwest proposes to offer stand alone DS0 loops at rates that are nearly 30% higher than what the identical network facilities could be purchased for if available as UNEs.[139]

With regard to DS1 and DS3 loops, Qwest has offered to "discount" its tariffed special access rates in the context of a "Regional Commitment Program" ("RCP") offering, but only if McLeodUSA binds itself, and is able to comply with, term and volume commitments for obtaining such facilities.[140] Because the RCP is footprint-wide, it extends outside of the nine wire centers affected by the *Omaha Order* and in areas where McLeodUSA is legally entitled to obtain such facilities as UNEs at significantly more economical cost-based rates. The scope of Qwest's bundled offer is, therefore, excessive, and it is apparent that, absent any relief from the Commission, McLeodUSA will be forced to replace the loops and transport formerly available as

[138] McLeodUSA Petition for Modification, Declaration of Don Eben, McLeodUSA Telecommunications Services, Inc., ¶ 5 ("Eben Declaration").

[139] It is also noteworthy that McLeodUSA has approached Cox on at least two occasions regarding its willingness to entertain a commercial arrangement for McLeodUSA to lease from Cox last mile network facilities. McLeodUSA was rebuffed on both occasions. *See* McLeodUSA December 2006 Letter at 2.

[140] McLeodUSA Petition for Modification, Eben Declaration, ¶¶ 10-11.

UNEs by leasing such facilities from Qwest at a combination of prohibitive special access rates and premium DS0 "commercial" rates.

McLeodUSA's repeated good faith attempts to negotiate wholesale replacement arrangements for loops and transport with Qwest following release of the *Omaha Order* have been met with Qwest's steadfast refusal to negotiate any wholesale pricing for the affected wire centers that deviates from its special access and RCP pricing. Qwest is exercising monopoly power by refusing to change its position on key points since it knows McLeodUSA has no alternative supplier of network elements. There simply is no market force constraining Qwest from offering a "take it or leave it" proposal. Of course, forcing competitive carriers out of the market means that those carriers' customers will be forced to go back to Qwest, thereby increasing the margin Qwest will realize from directly serving these end users.[141]

While Qwest has made commercial pricing for DS0 loops available for some time in Omaha, a review of the associated agreement reveals numerous unacceptable and onerous terms. For example, Qwest has priced the commercial two-wire DS0 loop rates nearly 30% higher than TELRIC rates, and has specifically excluded all wholesale performance standards from Qwest's

[141] While it may be true that mass market customers may choose to switch to Cox, *see Omaha Order*, ¶ 66, business customers, and in particular, small and medium sized customers served with T1 services, will not have a choice of facilities-based providers unless Cox is directly connected to each affected customer's premise with their own connection. The evidence in the Omaha docket did not indicate that Cox had actual connections to each business customer location, but only that Cox's network passed by in certain wire centers.

service offering, including Section 271 performance metrics.[142] Moreover, the commercial pricing for stand alone DS0 loops confirms the anticompetitive nature of Qwest's wholesale pricing. Qwest offers CLECs a lower-cost DS0 loop if the CLEC combines that loop with Qwest local switching. The identical loop facility is nearly 30% more expensive when purchased without Qwest local switching attached. Clearly, there is no cost justification for the significantly higher price point. Qwest is merely able to extract a 30% monopoly premium for the standalone DS0 loop since CLECs have no alternative. There is no "market incentive" since Qwest has no competition in the wholesale market for DS0 loops. This price discrimination is wholly inconsistent with the Commission's prediction that Qwest would offer network facilities at competitive rates for use in conjunction with a "competitor's own services and facilities."[143] Qwest's price discrimination appears to be intentionally designed to drive facilities-based competitors out of the market.

Another egregious illustration of Qwest's refusal to negotiate wholesale pricing involves the exorbitant non-recurring charges ("NRCs") that it seeks to impose for high capacity circuits. For example, to install a UNE DS1 loop and cross connect in Nebraska, the cost-based NRC is

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[142] *See* McLeodUSA Petition for Modification; Eben Declaration, ¶¶ 20, 24-25, and Exhibit 3, at 43-70 of 70 (Qwest's DS0 Loop Facility offering is attached to the MSA as Service Exhibit 1). According to Qwest's website, only one CLEC (TCG Omaha) has executed what appears to be Qwest's template agreement. *See* http://www.qwest.com/wholesale/clecs/commercialagreements.html.

[143] *Omaha Order*, ¶ 83.

$136.15.[144] For the Omaha MSA central offices where it has pricing flexibility, Qwest has set the NRC at $626.50.[145] That amounts to a 360% increase in NRCs that has resulted from the grant of forbearance.

Monthly recurring charges ("MRCs") also increase significantly in the forbearance wire centers. UNE DS1 loops in Zone 1 increase from $76.42 to a "price flex" rate of $182.22, a 138% increase.[146] The prospect of these enormous cost increases have already led McLeodUSA to significantly limit its Omaha operations. CLECs simply cannot be viable carriers in Omaha unless the wholesale pricing regime is significantly modified.[147]

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[144] McLeodUSA Petition for Modification, Eben Declaration, ¶ 27.

[145] Qwest has been granted pricing flexibility in all nine Omaha wire centers affected by the forbearance. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 02-01, Memorandum Opinion and Order, 17 FCC Rcd 7363 (WCB Apr. 24, 2002) (granting Qwest Phase II pricing flexibility in the Omaha MSA, among other MSAs). This has permitted Qwest to *increase* its pricing for high capacity circuits. *See* Eben Declaration, ¶ 9. It therefore appears that Qwest's response to the grant of special access pricing deregulation was a better indicator of what Qwest would do once Section 251(c) UNEs were eliminated.

[146] McLeodUSA Petition for Modification, Eben Declaration, ¶ 6.

[147] To date, Qwest has continued to invoice McLeodUSA in the affected Omaha wire centers at UNE pricing. However, it is Qwest's position that it is entitled to re-rate all network elements in the affected wire centers to the March 2006 effective date of the *Omaha Order* and backbill McLeodUSA. Accordingly, for planning and financial purposes, McLeodUSA has had to operate as if the higher costs resulting from the loss of UNEs are already in effect. McLeodUSA is particularly disadvantaged because, in contrast to the *Anchorage Order*, where the Commission's grant of forbearance was conditioned on ACS's continued provision of local "legacy" loops pursuant to the existing rates, terms and conditions between ACS and GCI in Fairbanks, Alaska, until such time as commercial agreements were concluded, the *Omaha Order* contains no affirmative steps to establish interim pricing pending the negotiation of commercial replacement arrangements. *See Anchorage Order*, ¶¶ 39-42.

Qwest's persistent refusal to negotiate wholesale rates following the *Omaha Order* contravenes not only the Commission's predictive judgment regarding Qwest's conduct once forbearance was granted for Section 251(c)(3) loops and transport, but its Section 271 obligation to provide wholesale access to local loops, transport, and other network elements "at just and reasonable prices."[148] Because the Commission's predictive judgment was premised in part on Qwest's compliance with Section 271 pricing requirements, Qwest's flouting of this obligation provides further reason for the Commission to deny forbearance in any other MSA at this time.

Given all of this, there is no foundation for a "predictive judgment" that CLECs would be able to obtain competitive prices for wholesale access in a forborne environment. The necessity for, and the benefit of maintaining Qwest's UNE obligations is patent - it provides for robust competition in a given market. The predictive judgment of competitive prices in the *Omaha Order* was little more than wishful thinking and speculation. The Commission should avoid the same error in connection with the instant Petitions.

V. INDEPENDENT EVIDENCE SHOWS THAT QWEST DOES NOT FACE SUFFICIENT COMPETITION TO WARRANT FORBEARANCE

Apart from Qwest's weak and inconsistent showings of competition, , independent evidence, including findings by the Commission and other government authorities, precludes a finding that Qwest faces significant independent facilities-based competition that could warrant forbearance.

[148] *Omaha Order*, ¶ 103.

A. Independent Surveys and Government Reports Show that Qwest Possesses Bottleneck Control of Last Mile facilities in the Four MSAs at Issue.

Integra has recently conducted a survey of multi-tenant office buildings in several cities in the Qwest region, including Minneapolis, Phoenix, and Seattle to ascertain how many independent networks are typically physically present at these buildings. (See Attachment 2, First Declaration of Geoffrey Williams, Integra Telecom, Inc.). (Denver was not included because Integra does not provide service there.) During June 2007, whenever an Integra technician visited a building of an Integra customer for any reason, such as change of service or technical issues, the technician noted which providers had a fiber presence to the building. The total buildings surveyed are approximately only 1% of all buildings in which Integra has customers. The results were that in Minneapolis only 4 out of 61 buildings visited were served by competitive fiber; in Phoenix 3 out of 55 buildings were served by competitive fiber; and in Seattle 12 out of 217 buildings had competitive fiber. This survey shows that there are remarkably few commercial buildings in these MSAs that have competitive facilities, and that nearly all of the providers at the buildings surveyed were dependent on ILEC facilities to provide service.

Integra's survey is consistent with, and confirms, analyses and data of the Commission and the GAO. In *Local Competition: Status as of June 30, 2006,* the Commission presented its most up to date summary statistics on the state of competition in local telephone markets across the United States.[149] Based on publicly available statewide data, the *Local Competition Report* shows that ILECs such as Qwest provide an overwhelming percentage of the residential and business lines in each market. In the residential market, ILECs control 71% of the lines in Arizona, 91% in Colorado, 85% in Minnesota, and 95% in Washington.[150] ILECs also control 68% of the business lines in Arizona, 86% in Colorado, 68% in Minnesota, and 69% in Washington.[151] It strains credibility for Qwest to argue that the residential market is competitive when the Commission's own data shows that, with the exception of Arizona, CLECs serve less than 16 percent of the market in any state. The picture is only slightly better in the business markets, where CLECs have managed to obtain a competitive toehold of less than on third of the market in every state. ILECs are still the strongest players in the market, and no amount of sophistry by Qwest should convince the Commission otherwise.

After examining the state of facilities-based competition in sixteen major metropolitan areas, including the Seattle, Phoenix, and Minneapolis MSAs now at issue, the GAO reached the conclusion that on average competitive facilities are present in "less than 6 percent of buildings with at least a DS-1 level of demand" and approximately 15 percent of buildings with a DS-3

[149] *Local Telephone Competition: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau (January 2007) ("*Local Competition Report June 30, 2006 Status*").

[150] *Id*., at Tables 10-12.

[151] *Id*.

level of demand.[152] The picture is even more grim in the MSAs in which Qwest now seeks for forbearance. For example, in the Phoenix MSA the GAO found that only 3.7% of DS-1 buildings and 11% of DS-3 buildings are lit with competitive fiber.[153] Similarly, in the Seattle and Minneapolis MSAs only 3.8% and 5.7%, respectively, of DS-1 buildings are lit with competitive fiber.[154]

The GAO also found that rates for special access services, touted by Qwest as a competitive alternative, have generally increased where they are not regulated.[155] This is yet another indicator that facilities-based competition is not yet robust enough to constrain prices in the sixteen MSAs subject to the GAO study. In short, the GAO report reinforces the point that competition in the Phoenix, Seattle, and Minneapolis MSAs, and most likely in the Denver MSA though it was not studied, has not obtained the critical mass necessary to warrant the removal of the Act's unbundling and transport obligations.

In light of these figures, it is not possible for Qwest to claim that it faces significant independent facilities-based competition.

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[152] GAO Report at 12.

[153] *Id.* at 20.

[154] The numbers for DS-3 buildings are only slightly better, with 15% in Seattle and 21% in Minneapolis lit by competitive fiber.

[155] *See* GAO Report at 12-13.

B. Competitors Have Shown, and the Commission Has Found, that Competitors Are Rarely Able to Construct Last Mile Connections

The reason why competitive fiber extends to few buildings and that competitors remain dependent on Qwest facilities is that they are rarely able to justify construction of their own loops. The attached Declaration of David Bennett, Integra Telecom, Inc. (See Attachment 3) shows that it is rarely if ever economically feasible for competitors operating in Denver, Minneapolis, Phoenix, and Seattle to construct loops at the DS0, DS1, or DS3 level. The Commission has a wealth of information before it in other proceedings to the same effect. Most recently, PennTel, McLeodUSA, and DeltaCom have provided declarations to the effect that they are rarely able to find or construct alternatives to ILEC last mile facilities in the markets in which they operate.[156] Information and declarations of competitive carriers in the pending Verizon forbearance proceeding also show that competitive carriers cannot feasibly construct at these capacity levels.[157] And the Commission in the *TRRO* provided the analysis and further factual information explaining why this is the case -- the revenue opportunities at these capacity levels

[156] Comments of ATX *et al.*, WC Docket No. 05-25, Declaration of Don Eben, McLeodUSA Telecommunications Services, ¶ 4, Declaration of Kevin J. Albaugh, Penn Telecom, Inc., ¶ 8, Declaration of Steven H. Brownworth, Deltacom, Inc., ¶¶ 3-4 (filed Aug. 8, 2007).

[157] *See, e.g.*, Comments of Time Warner Telecom, Inc., WC Docket No. 06-172, at 20-26 (filed Mar. 5, 2007).

are insufficient to justify construction.[158] The Commission has *never* found that CLECs would not be impaired if denied access to stand alone copper loops.[159]

Accordingly, because CLECs cannot feasibly construct last mile connections, it is not surprising that Qwest has not been able to demonstrate independent facilities-based competition at these capacities levels that could justify forbearance.

C. Independent Churn Studies Show that Cable Is Not a Significant Competitor

Integra has recently commissioned a study of its customer churn and to whom it loses customers, including in the MSAs in question. (See Attachment 4, Second Declaration of Geoffrey Williams, Integra Telecom, Inc.). In this study, Integra surveyed customers in six states in which it operates including Minnesota and Washington that, from July 2006 to through June 2007, had switched to other providers. This study shows one of the lowest churn rates in the industry and high customer satisfaction with the quality of Integra's services. This study additionally shows that Integra rarely if ever loses customers to cable operators. Of those customers who did switch from Integra to another telecommunications provider and for whom Integra was able to identify the new provider, only approximately 12% switched to a cable operator whereas approximately 81% switched to an ILEC or to a CLEC that uses ILEC wholesale facilities. These results simply confirm and illustrate the continuing dominance of the ILECs and the minimal

[158] *TRRO*, ¶¶ 150-154.

[159] *Id*., ¶¶ 66 & 146.

penetration of the cable companies in both the retail and wholesale telecommunications markets for SME and enterprise services.

VI. FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING WOULD BE CONTRARY TO THE PUBLIC INTEREST

Under the third prong of the forbearance analysis, Section 10(a)(3), the Commission should conclude that competitive access to § 251(c)(3) loop and transport UNEs in the four Qwest MSAs at issue remains vital to the public interest.[160] Section 10(b) states that before arriving at a contrary conclusion as Qwest asks, the Commission must find that the requested forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[161]

In the *Omaha Order*, the Commission concluded that "granting Qwest relief from its loop and transport unbundling obligations in parts of the Omaha MSA will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b)."[162] It further held that "the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits."[163] The Commission explained that forbearance in Omaha was in the public interest because regulatory intervention results in reduced incentives to innovate and invest in facilities as well as creating the complex regulations governing the

[160] 47 U.S.C. § 160(a)(2).

[161] *Id*. at § 160(b).

[162] *Omaha Order*, ¶ 75.

[163] *Id.*, ¶ 76.

sharing of facilities.[164] It stated that the high degree of regulatory intervention required by the Telecommunications Act of 1996 to generate competition is no longer justified where "local exchange markets are sufficiently competitive," such as in the nine Omaha wire centers where Qwest was granted forbearance, and that forbearance would also serve the public interest by increasing regulatory parity in the Omaha telecommunications services market.[165]

In the *Anchorage Order*, the Commission concluded that relieving ACS from the section 251(c)(3) access obligations and section 252(d)(1) pricing obligations for loop and transport elements, subject to the condition it adopted, was in the public interest under section 10(a)(3).[166] It explained that the factors upon which its conclusions under Sections 10(a)(1) and (2) were based also convinced it that this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).[167]

Even if these determinations were valid, the same cannot be said of the four markets where Qwest seeks § 251(c)(3) loop and transport unbundling relief. As shown below, Qwest's forbearance request fails to meet the Section 10(a)(3) public interest standard under the Commission's standards set forth in the *Omaha* and *Anchorage Orders.*

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[164] *Id*.

[165] *Id*., ¶ 78.

[166] *Anchorage Order*, ¶ 49.

[167] *Id*.

First, the Section 10(a)(1) considerations discussed above demonstrate that Qwest's request for unbundling relief is not in the public interest. Second, as shown in Section IV, above, granting Qwest's request will not enhance [and] … promote competition among providers of telecommunications services" as section 10(b) requires.[168]

Third, there is no evidence that Qwest's competitors have facilities that cover a percentage of the end user locations accessible from each of the wire centers in the four MSAs comparable to the market shares the Commission used as competitive thresholds in the *Omaha* and *ACS Orders*.[169] The Commission has emphasized that the public interest in establishing regulatory parity between competitive carriers and ILECs is *not* served until "the benefits of competition are sufficiently realized and competitive carriers have constructed their own last mile facilities and their own transport facilities."[170] Qwest has not satisfied this evidentiary burden and, as demonstrated above, it still remains the dominant provider of business and residential telecommunications services. Nor has Qwest shown that competitive wireline loop and transport facilities to end users ubiquitously exists throughout each of the four MSAs at issue.[171] Because adequate competitive facilities-based alternatives to Qwest's bottleneck facilities have not developed in the

[168] 47 U.S.C. § 160(b).

[169] *Omaha Order*, ¶ 69; *see also Anchorage Order,* ¶ 31.

[170] *Omaha Order*, ¶ 78; *see also Anchorage Order,* ¶ 28.

[171] Furthermore, for the reasons stated in section IV.C above, intermodal competition from VoIP and Wireless providers are not substitutes for wireline services. For this reason, the Commission should not consider wireless or VoIP competition in determining whether Qwest's requested forbearance relief is in the public interest.

relevant MSAs, it would not be in the public interest to grant Qwest's forbearance petition as to § 251(c)(3) unbundling.

In the *Omaha Order*, the Commission made a "predictive judgment" that Qwest would not strand competitive investments by curtailing access to its analog, DS-0, DS-1, or DS-3-capacity facilities.[172] It postulated that Cox's ability to absorb customers onto its proprietary network would supply enough competitive pressure to force Qwest to "maximize use of its existing local exchange network, providing service at retail *and at wholesale*."[173] The Commission predicted this because Cox had its own loops and transport connected to a certain percentage of Qwest's end-users in the nine wire centers in Omaha, and thus the potential existed that Cox would absorb customers into its proprietary network. The Commission made similar findings in the *Anchorage Order* with respect to the five wire centers where forbearance relief was granted.[174] However, as noted throughout this Opposition, unlike Omaha and ACS, Qwest has not attempted to demonstrate that its competitors have facilities deployed to a substantial portion of the end users throughout each of the wire centers in each of the four MSAs and can absorb

[172] *Omaha Order*, ¶ 80.

[173] *Id.*, ¶ 81.

[174] *See Anchorage Order*, ¶¶ 44 & 49. The Commission emphasized that given "GCI's increasing ability to absorb customers over its own last-mile facilities, ACS will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so." *Id.*, ¶ 49. "Faced with aggressive 'off-net' competition from GCI," the Commission predicted that "ACS will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to GCI's service." *Id.*

customers without any reliance on Qwest's facilities. Lacking such evidence, the Commission cannot conclude that Qwest would face similar competitive pressure and thus there is no reason to believe Qwest will not curtail competitive access to its facilities.

Similarly, it would be a mistake for the Commission to conclude that Qwest's existing obligations to offer special access or section 271 loop and transport facilities are sufficient alternatives to § 251(c)(3) facilities. The Commission's prediction to that effect in Omaha has been proven wrong by experience.[175] Further, market pressures in the four MSAs at issue here have not forced Qwest to reduce its special access rates; rather, it has increased them. The simple fact is that § 251(c)(3) loop and transport forbearance will harm competition in MSAs where Qwest seeks it. Qwest has failed to satisfy the standards set in the *Omaha Order*, much less demonstrate that forbearance "will enhance [and] ... promote competition among providers of telecommunications services."[176] Rather, removing Qwest's unbundling obligations will thwart competition by forcing competitive carriers with no other options to purchase loops and transport at above-market prices. This will undermine their ability to compete, which runs contrary to the public interest standard.

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[175] *See* McLeodUSA Petition for Modification; *see also* Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006) (explaining that because forbearance granted by the FCC in the Omaha Market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in its network facilities in the market, McLeodUSA "will either sell or cease its operations in the market, despite its enormous investment in its own network and facilities").

[176] 47 U.S.C. § 160(b).

Accordingly, the Commission may not conclude that the requested forbearance would be in the public interest.

VII. FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING IS UNLAWFUL

Qwest's Petitions claim that unbundling relief is justified by the Commission's analysis in the *Omaha Order* and the *Anchorage Order* where the Commission granted forbearance from § 251(c)(3) loop and transport unbundling obligations. However, as shown below, the analysis in these two orders remains flawed, and the Commission should not exacerbate its error by granting Qwest's Petitions for § 251(c)(3) unbundling relief.

A. The Commission May Not Decouple § 10 Forbearance from § 251(d)(2) Impairment

1. The language and structure of § 10 require that the Commission include the § 251(d)(2) impairment standard in evaluating ILEC requests for forbearance from § 251(c)(3) unbundling

Section 10(b) directs the Commission to "consider whether forbearance … will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). The primary tool Congress conferred on the Commission to assess competition among providers of telecommunications services was the market opening provisions of section 251(c) and the impairment standard of section 251(d)(2). In other words, impairment remains the "touchstone" for assessing whether competitive entry into monopoly markets is achievable absent access to parts of the incumbent's network.[177]

The Commission may not reasonably determine the impact on competition as required under Section 10(b) without applying its "touchstone" impairment test. Forbearance from unbundling obligations in circumstances where CLECs are impaired thwarts development of facilities-based alternatives to incumbent networks. As noted elsewhere in this Opposition, in a forborne environment CLECs become subject to higher prices and unreasonable terms and conditions of service in the vast majority of circumstances where they remain dependent on ILEC last mile facilities to serve customers such as mass market and SME customers to whom it is never economic to construct loops. Thus, section 10(d) effectively requires the FCC to apply its impairment analysis when an ILEC seeks forbearance requested from section 251's mechanisms designed to induce competition between telecommunications providers. The "fully implemented" requirement of Section 10(d), for example, directly links forbearance to the Act's unbundling provisions in sections 251 and 271. Therefore, the Commission must consider the extent to which competitors are impaired under Section 251(d)(2) before granting forbearance from the Act's unbundling requirements. The Commission should not repeat its failure to perform this test in either the *Omaha or Anchorage Orders*.[178]

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[177] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002).

[178] If the Commission applies a different test than the carefully crafted impairment test, it must provide a rational explanation for its departure from precedent. This explanation must include a thorough explanation of how its standard for evaluating impairment under section 10 is

2. The Commission's forbearance analysis must be consistent with the impairment analysis

The D.C. Circuit's decision in *AT&T Corp. v FCC*[179] requires that the Commission review forbearance requests in a manner that is consistent with the Commission's prior policies and standards applied in similar cases or explain why it is reasonable to depart from them.[180] Thus, when considering petitions for forbearance from the Act's unbundling requirements, the Commission's analysis must be consistent with its impairment framework, in particular the framework established in the *TRRO* and affirmed by the D.C. Circuit in *Covad*.[181] The *Omaha Order* failed to do this, but the Commission should not repeat that failure with respect to Qwest's Petitions. The statutory impairment standard cannot be ignored simply because Qwest seeks relief under section 10 rather than section 251(d)(1). The relief Qwest requests is the legal and practical equivalent of a finding of non-impairment in particular MSAs identified in Qwest's Petitions. The FCC cannot use the statutory criteria of section 10 "as a form of legal jujitsu to justify its relaxation"[182] of section 251(c)(3) unbundling obligations. Granting Qwest's petition,

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different than its standard for evaluating impairment under section 251 and why abandoning the touchstone of impairment is warranted.

[179] 236 F.3d 729, 736 (D.C. Cir. 2001) ("*AT&T*").

[180] *Id.* (finding that the Commission's analysis in evaluating forbearance from dominant carrier regulation cannot depart from Commission's traditional non-dominance analysis without justifying such departure.) .

[181] *See Covad Comm'ns Co. v FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[182] *Ass'n of Comm'ns Enters. v FCC*, 235 F.3d 662, 667 (D.C. Cir. 2002).

whether in whole or in part, absent an impairment analysis consistent with the *TRRO* would represent an unexplained departure from the FCC's recently affirmed impairment standard.[183]

B. Section 251(c) Has Not Been "Fully Implemented" and the Omaha Order's Interpretation of the Term "Fully Implemented" was Unreasonable

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 … until it determines that those requirements have been fully implemented."[184] Although the *Omaha Order* found that this requirement was satisfied, it relied on a patently unreasonable interpretation of the statute that the Commission should now correct and not repeat when considering Qwest's Petitions. The D.C. Circuit's opinion in *Qwest v FCC*, 482 F.3d 471 (D.C. Cir. 2007) does not foreclose this issue; the Court did not fully resolve the Petitioner's attack on the Commission's construction of Section 10(c) but found that the arguments were not sufficiently raised below and were thus barred under Section 405 of the Act.[185]

1. The *Omaha Order* is Unreasonable and Inconsistent with Previous Commission Decisions

The *Omaha Order* improperly concluded that "fully implemented" means no more than an initial rulemaking by the Commission. It further found that the Commission is the entity that "implements" Section 251(c), and "hence the full implementation of section 251(c) is triggered

[183] *See Covad*, 450 F.3d 528.

[184] 47 U.S.C. §160(d).

[185] *Qwest v FCC*, 482F.3d at 472.

by action taken by this Commission."[186] This interpretation of "fully implemented" was flawed for several reasons.

First, the Commission previously viewed the adoption of its rules as the beginning, not the end, of implementation of Section 251(c). In the *Local Competition Order*, the Commission described its initial adoption of Section 251(c) rules as merely "*the initial* measures that will enable the states and the Commission *to begin* to implement sections 251 and 252."[187] The *Omaha Order* failed to address, or even distinguish, the Commission's prior view that implementation of Section 251(c) involves substantial activity by it, the states, and ILECs well beyond any rules it promulgates to implement this section of the Act. For example, the Commission found that Section 251 involves an "allocation of responsibilities" between itself and the states.[188] Both the Commission and the states administer the Commission's rules and the states perform other critically important functions pursuant to Section 251.[189]

The *Omaha Order* ignores these previous findings that Commission rules are the initial measures needed to implement § 251 and fails to explain its reason for abandoning its precedent.[190] The *Omaha Order* asserts that Congress intended Section 251(c) to be "fully imple-

[186] *Omaha Order*, ¶ 53.

[187] *Local Competition Order*, ¶¶ 6, 307(emphasis supplied).

[188] *Local Competition Order*, ¶ 41.

[189] *Id*., ¶ 53.

[190] *See AT&T*, 236 F.3d at 734.

mented" under Section 10 upon the mere establishment of rules by the Commission.[191] The Commission silently departed from previous policies and ignored precedent in rendering this decision,[192] but it should not compound this mistake by granting Qwest's Petitions based on this decision.

Second, the *Omaha Order* also improperly disregarded the statements of the D.C. Circuit in 2001 that Section 251(c) had not been fully implemented.[193] The Commission assumed the court meant merely that the Commission had not at that time interpreted "fully implemented."[194] But, like the *Omaha Order*, this ignores the Commission's previous (and correct) view that the initial establishment of rules was the beginning, not the end, of implementation of Section 251(c). The fact that many petitions for reconsideration and clarification of the FCC's 251(c)(3) rules remain unresolved[195] and many state proceedings implementing the *TRRO* remain ongoing or have yet to be initiated reinforce this point.[196]

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[191] The finding of *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II")* that the FCC in its *TRO* had unlawfully delegated authority to the states to establish, pursuant to Section 251(d)(2), unbundling standards does not invalidate the FCC's view in the *Local Competition Order* that, under the Act, states play a key role, such as through setting prices and conducting arbitrations, in implementing Section 251(c).

[192] *AT&T*, 236 F.3d at 736.

[193] *Ass'n of Comm'ns Enters. v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001).

[194] *Omaha Order*, ¶ 53 n.133.

[195] *See, e.g.*, Petition for Reconsideration of CTC Communications Corp., *et al.*, WC Docket No. 04-313, CC Docket No.01-338 (filed Mar. 29, 2005); Petition for Reconsideration of CBEYOND Communications, WC Docket No. 04-313, CC Docket No. 01-338 (filed Mar. 28, 2005); Petition for Reconsideration of Birch Telecom, Inc., *et al.*, WC Docket No. 04-313, CC Docket No. 01-338 (filed on Mar. 28, 2005); Petition for Reconsideration and/or Clarification of the

Third, the *Omaha Order's* interpretation of "fully implemented" amounts to an "error in judgment."[197] The Commission's rules ordinarily become effective thirty days after publication in the Federal Register, or even sooner based on special showings.[198] Under the Commission's interpretation of "fully implemented," one must presume that Congress intended for Section 251(c) to be deemed to be fully implemented shortly after the Commission, pursuant to Section 251(d)(1), adopted its original rules on August 6, 1996. But it is highly improbable that Congress

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PACE Coalition, WC Docket No, 04-313, CC Docket No. 01-338 (filed on Mar. 28, 2005); Petition for Reconsideration and/or Clarification of Order on Reconsideration of Covad Communications Group, Inc. *et al.*, CC Docket Nos. 01-338, 98-147, 96-98 (filed Jan. 28, 2005).

[196] For instance, the State commission proceedings implementing the *TRRO* and *TRO* remain ongoing in Delaware, Maryland, and Pennsylvania. *See In the Matter of the Petition of DIECA Communications Inc., d/b/a Covad Communications Company, D-Tel LLC, SNiP LiNK LLC, Xo Communications Services, Inc., f/k/a XO Delaware, Inc., and XTel Communications, Inc., for an Amendment to Interconnection Agreements with Verizon Delaware Inc., Pursuant to Section 252(B) of the Communications Act of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order; In the Matter of the Application of Verizon Delaware Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order,* PSC Doc. Nos. 05-164; 04-68; *In the Matter of the Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to Interconnection Agreements of Various Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Maryland Pursuant to Section 252 of the Telecommunications of 1996*, Case No. 9023; *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant To Section 252 of the Communications Act of 1934, As Amended, and the Triennial Review Order*, P-00042092. Moreover, Section 252 arbitrations implementing the FCC's *TRO* and *TRRO* rules have yet to be initiated in many states across the Nation.

[197] *AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (citing *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001)).

[198] 5 U.S.C. § 553(d).

intended to allow the Commission to forbear from application of Section 251(c)(3)'s requirements virtually at the moment the FCC's rules for implementing the requirements became effective — and prior to them being overturned three times and before sustainable competition due to that unbundling has truly emerged. The Commission should conclude that it made an error in judgment in the *Omaha Order* that should be corrected here.[199]

Fourth, the Commission's current interpretation of Section 10(d) with respect to Section 251(c) - that states that section is "fully implemented" when the Commission adopts rules implementing Section 251(c) cannot be squared with the *OI&M Forbearance Order*, where the Commission held that section 10(d) applies not only to the statutory requirements of section 251(c), but also to the Commission's regulations implementing those requirements.[200] In that Order, the Commission denied Verizon's petition for forbearance from the Commission's rules regarding Bell Company sharing of operating, installation and maintenance functions. These rules were adopted by the Commission and are not found in the statute. *See* 47 C.F.R. § 53.203(a)(2). The Commission found that it could not forbear from applying these rules because Section 10(d) prohibited forbearance from the rules until the Section 271 was fully implemented. *OI&M Forbearance Order* at ¶ 5. Under that logic, forbearance from the Commission's rules promulgated under § 251(c) is not permitted until § 251(c) is "fully implemented."

[199] *See AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (citing *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001)).

[200] *OI&M Forbearance Order*, ¶¶ 7-8.

Fifth, the Commission's interpretation of section 10(d) is unreasonable (and therefore impermissible) because it undermines the Act's purposes. The requirements of section 251(c) - one of the core provisions intended to *open* local markets to effective competition is designed to ensure that local markets *remain* open to competition. Specifically, the interconnection, unbundling and resale obligations of section 251(c) are designed to establish a baseline requirement that core network facilities continue to be made available on nondiscriminatory terms until Qwest's substantial market power is sufficiently dissipated. It would therefore make no sense to grant the Commission authority to forbear from enforcing discrete requirements of section 251(c) (such as loop unbundling requirements) merely upon a finding that the Commission has established rules requiring the ILECs to provide unbundling, resale and interconnection. Section 10(d) was clearly designed to place the entire framework of local competition protections off-limits from the exercise of forbearance authority until all of the requirements of those interrelated provisions are fully implemented.

2. Section 10(d) Bars Forbearance from Section 251(c) Until the ILEC Provides Proof of a Robust, *Wholesale* Market

The interpretation of "fully implemented" adopted in the *Omaha Order* is erroneous because it is inconsistent with the core objectives of the Act. The Commission has established that a critical question in determining whether section 251 or 271 has been fully implemented is whether the "goals" of the underlying statutory provisions are fulfilled.[201] It is clear that the goals underlying Section 251's unbundling requirements have yet to be fulfilled.

In drafting Section 10, Congress anticipated that the "forbearance authority will be a useful tool in ending unnecessary regulation."[202] But Section 10 was designed to give the Commission a tool to clear the underbrush of sixty years of regulation that had accumulated since enactment of the original Communications Act — some of which was no longer necessary yet remained on the books. Section 10 was not intended as a destructive black hole that would suck in and annihilate Congress' newly enacted scheme to promote and enhance local competition.

It is unfathomable that Congress would have with one hand "reorganize[d] local telecommunications markets," with the "objective of uprooting the monopolies" over local telecommunications services but with the other hand permit the FCC to repeal those very provisions of the Act before the stated goal was achieved.[203] Congress explicitly limited the FCC's ability to grant forbearance from the Act's market opening provisions until those provisions were "fully implemented."[204]

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201 *Petition of Verizon for Forbearance from the Prohibition of Sharing, Operating, Installation, and Maintenance Functions Under Section 53.203(a0(2) of the Commission's Rules*, Memorandum and Order, 18 FCC Rcd 23525, ¶7 (2003) ("*Verizon Forbearance Order*").

202 *See* Committee on Commerce Report, HR 1555, Section 103 (104th Congress, July 24, 1995).

203 *See Verizon*, 535 U.S. at 488.

204 47 U.S.C. §160(d).

Sustainable competition cannot be realized, and thus Sections 251 is not "fully implemented," unless there exists viable cost-based, wholesale alternatives to the ILECs' bottleneck facilities such that incumbent carriers are no longer deemed "dominant" in local services markets.[205] The *Omaha Order*'s premature finding that Section 251 is "fully implemented contravenes the purpose of the Act, and flouts the Section 10(d)'s express requirement that the Commission, *as a threshold matter*, find Section 251 "fully implemented" before considering a forbearance petition.[206]

Section 251(c) focuses on making local telecommunications markets competitive by first opening them to competitors and then ensuring that those markets remain open to entry through interconnection, provision of UNEs or resale, or some combination thereof. As the Commission has explained, the long-term goal of the 1996 Act is to "creat[e] robust competition in telecommunications," particularly "competition among multiple providers of local service that would drive down prices to competitive level."[207]

Considering the paramount importance that Congress assigned to fostering the development of competitive local markets, the most reasonable reading of section 10(d) requires the Commission to find that a robust wholesale market for facilities and services exists in a relevant

[205] *Cf. Verizon*, 535 U.S. at 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

[206] *Verizon Forbearance Order,*18 FCC Rcd 23525, ¶¶ 5, 9.

[207] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,15 FCC Rcd 3696,¶ 55 (1999).

geographic area so that the Commission is assured that forbearing from enforcing the requirements of section 251(c) will not lead to the remonopolization of local and long distance services. Qwest must provide a record that focuses on a specific geographic market or markets. As the Commission recognized in the *TRO* and *TRRO*, alternative sources of supply of the network elements needed to provide competitive local service will become available in different markets at different times.[208]

Congress enacted section 10 to provide the Commission flexibility to forbear from statutory provisions and regulations where markets have become fully competitive and regulatory requirements are no longer necessary.[209] But Congress recognized that such a level of competition was not possible until the ILEC dominance over bottleneck facilities was broken. As Senator McCain explained section 10 would be met "when markets are deemed competitive."[210] It is absurd to claim that Congress intended to permit ILECs to seek release from their market-opening obligations under section 251(c) immediately after such obligations took effect for the very first time.

[208] *See e.g. TRRO*, ¶¶ 43-45; *TRO*, ¶ 118, 130.

[209] See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, 14 FCC Rcd 6004,7 6 (1999) ("For more than a decade prior to the 1996 Act, the Commission attempted to forbear from tariff regulation of nondominant IXCs, but was struck down by the courts. Subsequently, the Commission requested, and Congress granted in section 10 of the Act, forbearance authority, with the express understanding that it would be used to effectuate interexchange detariffing.").

[210] 141 Cong. Rec. S. 7942, 7957 (June 8, 1995) (statement of Senator McCain) quoting from Heritage Foundation letter).

Consequently, the Commission should find that section 251(c) is fully implemented only when, in addition to retail competition, there is a robust wholesale market, not as in Omaha, that Qwest is the only wholesale provider.

C. It Would Be Inconsistent with the TRRO for the Commission to Find that the Availability of Special Access, § 271, and Resale Offerings Justify Forbearance from Qwest's § 251(c)(3) Obligations.

1. Special Access and § 271 facilities are no substitutes to cost-based UNEs

The *Omaha Order* utterly ignored the *TRRO* by relying on the availability of Qwest special access services to justify the elimination of access to unbundled loops and transport. Having ruled in the *TRRO* that it would be a "hideous irony" to rely on special access—"the pricing of which falls largely within [ILEC] control"[211]—the *Omaha Order* irrationally relied *primarily* on the availability of special access in determining that continued application of Section 251(c)(3) was no longer necessary to ensure just, reasonable and nondiscriminatory rates or to protect consumers in the Omaha MSA.

The Commission should not take a similar approach when addressing Qwest's Petitions. Without the essential cost-based UNE pricing safeguard, there is nothing to prevent Qwest from raising prices on wholesale services to something "close to or equal to" the retail rate, creating a price squeeze. The Commission itself envisioned this scenario chilling competition. Thus, rather than sustaining a local competitive market, the elimination of Qwest's obligation to provide

[211] *TRRO*, ¶ 59.

UNEs will ultimately destroy it by trusting Qwest to maintain competitive wholesale pricing even though the company has little incentive to do so.

The Commission's reliance on the availability of Section 271 checklist items suffers from the same shortcomings as its reliance on the availability of special access. The BOCs contend that Section 271 checklist items are — for all relevant purposes — indistinguishable from special access. As is the case with special access, Section 271 checklist items are not subject to cost-based pricing. Instead, prices for Section 271 checklist items need only comply with the just and reasonable pricing standards of Section 201 and 202,[212] thus creating precisely the same risk of price squeezes that the Commission found to be an issue with special access pricing.

2. Resale is not a substitute for cost-based UNEs

The continued availability of resale services offered by Qwest pursuant to Section 251(c)(4) does not support relieving Qwest of provisioning cost-based loop and transport UNEs. As the FCC explained in the *Local Competition Order*, "carriers reselling [ILEC] services are limited to offering the same service an [ILEC] offers at retail", whereas carriers relying on UNEs can use those piece-parts as inputs to provide any service they choose to offer.[213] As a result, "carriers using [UNEs] … have greater opportunities to offer services that are different from those offered by [ILECs]" than is the case with carriers relying on resale.[214] The primary means

[212] *TRO*, ¶ 656.

[213] *Local Competition Order*, ¶ 332.

[214] *Id*.

by which a reseller competes with an ILEC is through price, and in that regard, its ability to do so "is limited … by the margin between the retail and wholesale price of the product."[215] In contrast, UNE-based competitors compete on price as well as through innovation. Accordingly, The Commission has already "reject[ed] the notion [that] the rebundling of UNEs is equivalent to resale."[216]

3. Unbundling forbearance is especially inappropriate given the significant open FCC proceedings related to special access, § 271 and § 251(c)(4) resale offerings

Apart from the fact that forbearance from Qwest's loop and transport unbundling was not appropriate because special access, § 271(c) offerings, and § 251(c)(4) resale are not sufficient competitive alternatives, such forbearance remains inappropriate given the significant open proceedings related to each of these critical obligations, and the numerous unresolved problems associated with their implementation. Because of this, Section 251(3) unbundling is critically needed to ensure that Qwest's telecommunications offerings are available at just, reasonable and nondiscriminatory rates, terms and conditions.

First and foremost, the special access framework is fraught with of problems and does not produce just and reasonable rates, terms and conditions reflective of a competitive market. In January of 2005, the Commission issued the *Special Access NPRM* to examine the rates, terms and conditions of price cap local exchange carriers' (LECs) interstate special access services and

[215] *Id*.

[216] *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 340 (1997).

the regulatory framework that should apply to them.[217] The Commission initiated this proceeding as a result of AT&T Corp.'s 2002 Petition for Rulemaking and its 2003 Petition for Mandamus to the D.C. Circuit requesting the court to direct the FCC to act and grant interim relief.[218]

In June and July of 2005, CLECs, IXCs and the Ad Hoc Users Group submitted comments in the *Special Access NPRM* urging interim and long term relief that, in many respects, echoed observations AT&T Corp. made in its 2002 Petition for Rulemaking. They generally claimed that the pricing flexibility triggers[219] and the CALLS[220] plan have failed to produce

[217] *See Special Access NPRM,* ¶ 19.

[218] *Id*., ¶ 21.

[219] In 1999, the Commission adopted the *Pricing Flexibility Order* to ensure that the Commission's interstate access charge regulations did not interfere with the development of competition within interstate access markets. *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶¶2, 19, 24, 68-175 (1999) ("*Pricing Flexibility Order*"). In it, the Commission developed competitive triggers designed to measure the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities. Pricing flexibility is obtained by price cap LECs in two separate phases, each on a Metropolitan Statistical Area (MSA) basis. There are separate triggers for two categories of special access services: (1) channel terminations (*i.e*., loops) connecting a LEC central office to a customer's premises; and (2) all other special access (primarily interoffice transport). Under Phase I Relief, a price cap carrier may offer volume and term discounts and customer-specific contract tariffs for interstate special access services, on one day's notice; however, services that are not offered under a discount or a contract remain subject to the general price cap rules. Under Phase II Relief, a price cap carrier may additionally set its generally-available special access rates at any level without regard to the price cap rules, on one day's notice.

[220] In 2000, the Commission adopted what is known as the CALLS plan. It was proposed by an industry coalition as a means to phase-out implicit subsidies and to move towards a more market-based approach to rate setting over a 5 year period. *See Access Charge Reform*, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"). The FCC offered price cap carriers a choice between completing the forward-looking cost studies that were required by the previous *Access Charge Reform Order*, or voluntarily making the rate

competitive prices, special access rates need to be reset to reflect actual costs, Phase II pricing flexibility should be abolished or tightened, and that some BOC term and volume special access contracts reflect pricing and other terms and conditions that could not be imposed in a fully competitive market.[221] They presented evidence that special access reforms are necessary because special access rates are not at levels that would exist in a competitive market.[222] They showed that special access rates are dramatically higher than the cost-based rates for comparable UNE services or rates offered by competitors.[223] In addition, ARMIS data revealed that the BOCs are enjoying increasing and excessive monopoly profits and returns on special access services.

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reductions required under the five-year CALLS plan. All price cap carriers opted for the CALLS plan. The goal of the plan was to transition the "marketplace closer to economically rational competition, and [to] enable [the Commission], once such competition develops, to adjust [the] rules in light of relevant marketplace developments." *Id.*, ¶ 36.

[221] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25 (filed June 13, 2005); Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 05-25 (filed June 13, 2005); Comments of NEXTEL, WC Docket 05-25 (filed June 13, 2005); Comments of COMPTEL/Ascent, WC Docket 05-25 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25 (filed July 29, 2005); Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 05-25 (filed July 29, 2005); Reply Comments of NEXTEL, WC Docket 05-25 (filed July 29, 2005); Reply Comments of COMPTEL/Ascent, WC Docket 05-25 (filed July 29, 2005).

[222] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25, at 3-13 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25, at 7-19 (filed July 29, 2005).

[223] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25, at 3-7 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25, at 7-10 (filed July 29, 2005).

As shown in response to the Commission's recent request to "refresh the record,[224] the BOCs continue to earn extraordinarily high returns on special access services. As of the year ended 2006, the BOCs' special access rates-of-return based on ARMIS data were as follows: AT&T - 100%; Qwest – 132%. Verizon – 52%. Overall, the BOCs averaged an astounding 78 percent rate-of-return.[225]

In 2004, it is estimated that that the BOCs' overcharges yielded $6.4 billion in excessive special access revenues or $17.5 million per day.[226] Sprint has estimated that its 2004 access charge cost was approximately $103 million higher under the FCC's current pricing flexibility regime than it would have been had those services been available at price cap rates.[227] From 2004 to 2006, the BOCs' overcharges increased 30 percent - *the BOCs' overcharges yielded $8.31 billion in excessive special access revenues or $22.77 million in overcharges per day in 2006*.[228]

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[224] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, WC Docket No. 05-25, RM-10593, FCC 07-123 (rel. July 9, 2007).

[225] *See* Comments of ATX *et al.*, WC Docket 05-25, at 12 (filed Aug. 8, 2007). The annual rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment to calculate the rates of return. *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

[226] Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-65, Reply Declaration of Susan M. Gately, ¶ 6 (filed May 10, 2005).

[227] Sprint Comments, WC Docket No. 05-25, at 5 (filed June 13, 2005).

[228] *See* Comments of ATX *et al.*, WC Docket 05-25, at 14 (filed Aug. 8, 2007).

Because these year-over-year returns would not be realized if the special access marketplace were truly competitive (which, as noted elsewhere, is what the FCC predicted, erroneously, would be achieved by now), competitive carriers that utilize the BOCs' special access services are paying far more for such services than what would be lawful, *i.e.*, just and reasonable, if rates, terms and conditions associated with them were objectively scrutinized by a regulatory authority. The GAO recent report discussed above confirms this.[229]

Second, the availability of Section 271(c) loop and transport facilities provides no safeguards for competition in the MSAs at issue if Qwest's request for forbearance from loop and transport unbundling is granted. As previously discussed, the BOCs contend that they satisfy their Section 271 checklist by offering special access services. Although the Act's just and reasonable pricing standard applies to section 271 elements, the BOCs deny that state commissions have the authority to investigate whether the BOC 271 rates are just and reasonable. The issue of whether state commissions have the authority to establish Section 271 rates and determine what rates are just and reasonable under Section 271 is currently before the Commission in two proceedings.[230] Furthermore, as Qwest realizes, there are competing decisions at the federal

[229] GAO Report at 13 (finding that the Commission's Phase II pricing flexibility rules do not accurately predict competition and that the "prices are higher, on average, in phase II MSAs - where competition is theoretically more vigorous- than they are… where prices are constrained" by price cap regulation).

[230] *See BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed July 1, 2004) (petitioning the Commission to assert exclusive jurisdiction over the enforcement of section 271 and preempt a state commission ruling asserting jurisdiction); Petition of the Georgia Public Service Commission for Declaratory Ruling and

district court level and among state commissions on these issues and number of these decisions are still being appealed.[231] The few state commissions that have investigated a BOC's 271 rates

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Confirmation of Just and Reasonableness of Established Rates, WC Docket No. 06-90 (filed Apr. 18, 2006).

[231] *See, e.g., Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), rev'd, , *Qwest Corp. v. Ariz. Corp. Comm'n*, No. 2:06-CV-01030-ROS, slip op. at 8-13 (D. Ariz. July 17, 2007); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s. Obligations to Provide Unbundled Network Elements, Docket No. 19341-U, Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271*, 2006 Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and Order Setting Rates Under Section 271, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm'n et al.*, No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm'n,* No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24, 2006); *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), Order, 2006 Ky. PUC LEXIS 680 (Ky. P.S.C. Aug. 16, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm'n et al.*, 3:06-CV-00065-KKC (E.D. Ky.) (filed Sep. 12, 2006); *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682, Order Part II (Me. P.U.C. Sep. 3, 2004), *aff'd, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), *appeal pending, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir. filed Jul. 19, 2006); *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon,* Case No. U-14447, Order, 2005 Mich. PUC LEXIS (Mich. P.S.C. Sep. 20, 2005), *appeal pending, Michigan Bell Tel. Co., d/b/a AT&T Michigan v. Covad Communications Company et al.*, No. 2:06-CV-11982 (E.D. Mich.) (filed Apr. 28, 2006); *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket No. P-421/CI-05-1996, Notice and Order for Hearing, 2006 PUC LEXIS 48 (Minn. P.U.C. May 4, 2006); *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, Arbitration Order, 2005 Mo. PSC LEXIS 963 (Mo. P.S.C. July 11, 2005), *rev'd in part SBC Missouri v. Mo. Pub. Serv. Comm'n, et al.,* 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. Sep. 14, 2006), appeal

have found that special access rates are not just and reasonable and have ordered the BOCs to charge other rates or have found that TELRIC rates apply unless the BOC can show that higher rates are just and reasonable.[232] In light of the significant disputes and uncertainty regarding the BOCs compliance with their 271 obligations it is unreasonable for the Commission to predicate forbearance from unbundling loops and transport on the availability of Section 271 elements.

Finally, Section 251(c)(4) resale cannot be relied on to provide wholesale access for competitors either. In 2000, the Eighth Circuit vacated and remanded the FCC's avoidable cost standard[233] that applied in determining the resale discount.[234] The Commission has yet to respond

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pending, No. 06-3726 (8th Cir. filed Oct. 17, 2006); *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing)*, Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief, 2005 N.H. PUC LEXIS 24 (N.H. P.U.C. Mar. 11, 2005), *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB (D. N.H. 2006), *appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc.*, No. 06-2429 (1st Cir. filed Sep. 21, 2006).

[232] *See, e.g., Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, Order Setting Rates Under Section 271, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006); Order on Reconsideration (Ga. P.S.C. Mar. 24, 2006); *VERIZON-MAINE Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order at 8 (Me. P.U.C. Oct. 6, 2006).

[233] Under the FCC's vacated standard, avoided retail costs were those costs that an ILEC "would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." *Local Competition Order*, ¶ 911.

[234] *Iowa Utilities Board v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000).

to the Eight Circuit's remand and its proceeding for gathering comments on how to modify the resale discount remains open.[235]

At bottom, for the Commission to entrust the viability of wholesale competition on special access, section 271(c) wholesale offerings, and section 251(c)(4) resale, is akin to saying wholesale competition is safe in a car with a cracked engine and radiator that leaks profusely, a grinding transmission, and bald tires with wheels that are barely attached. The car may be able to run but it won't go far. Indeed, the wholesale competitive industry would be placed in a perilous predicament if it had to rely on such a vehicle to develop and succeed. It would be arbitrary and capricious for the Commission to remove loop and transport unbundling in the four MSAs at issue, before it addresses the structural problems applicable to the ILECs' non-UNE wholesale offerings, *i.e.*, special access, Section 251(c)(4) resale, Section 271(c).

VIII. QWEST HAS ALREADY OBTAINED UNBUNDLING RELIEF WHERE COMPETITORS ARE ABLE TO CONSTRUCT THEIR OWN FACILITIES

Apart from any other reason, the Commission should deny the Qwest Petitions because it has already obtained unbundling relief where the Commission's rules adopted in the *TRRO* identify the wire center from which competitors can feasibly construct their own loops and transport.[236] Qwest refers to competition in the wire centers where most of its demand is concen-

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[235] *See Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd 18945, ¶¶ 141-146 (2003).

[236] *TRRO*, ¶¶ 167-181.

trated,[237] but these are the wire centers where it is most likely that the FCC rules already provide unbundling relief. Therefore Qwest has already obtained loop and transport unbundling relief in wire centers where competition is most pronounced. Qwest has additionally obtained unbundling relief for the FTTH, FTTC, and the packet-switched capability of hybrid loops. In light of this substantial forbearance relief, there is no basis for granting the instant Petitions. The Commission should deny the applications because Qwest has already obtained substantial unbundling relief tailored to where competitors are able to construct their own facilities.

IX. OTHER REQUESTED FORBEARANCE RELIEF IS UNJUSTIFIED

In addition to relief from Section 251(c)(3) unbundling obligations, Qwest seeks forbearance from Section 271(c)(2)(B)(ii) unbundling obligations, dominant carrier tariff regulation in Part 61 tariff rules, price cap regulation, Computer III Comparably Efficient Interconnection and Open Network Architecture requirements, and Section 214 and Part 63 obligations concerning acquiring lines, discontinuing services, and transfers of control.[238] Although its requests would apparently encompass deregulation of important services such as special access that are the subject of separate proceedings,[239] Qwest's request for forbearance from these obligations must

[237] Denver Petition at 2; Minneapolis Petition at 3; Phoenix Petition at 2; Seattle Petition at 3.

[238] Denver Petition at 3; Minneapolis Petition at 3; Phoenix Petition at 3; Seattle Petition at 3.

[239] *See generally, Special Access NPRM.*

be denied if for no other reason than that it makes no effort to separately address how forbearance from each of these requirements would meet Section 10 forbearance standards.

In addition, Qwest has not shown that it lacks market power in the provision of last mile and other inputs to competitors' services. Removal of the requested regulatory safeguards would inevitably lead to the elimination of competition that is dependent on Qwest facilities. Accordingly, Qwest has not shown that enforcement of these regulatory requirements is unnecessary to assuring reasonable terms and conditions of service and protecting consumers, that forbearance would be consistent with the public interest, or that it would promote competition.

X. CONCLUSION

The Commission should deny the above-captioned Petitions.

Respectfully submitted,

Affinity Telecom, Inc.
Cavalier Telephone, LLC
CP Telecom, Inc.
McLeodUSA Telecommunications
Services, Inc.
Integra Telecom, Inc.
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August 31, 2007

REDACTED – FOR PUBLIC INSPECTION

Affinity, Cavalier, CP Telecom
Globalcom, McLeodUSA, Integra, TDS
WC Docket No. 07-97
August 31, 2007

ATTACHMENT 1

DECLARATION OF HELEN E. GOLDING, ECONOMICS AND TECHNOLOGY, INC.

REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petitions of Qwest Corporation	)	
for Forbearance Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and	)	
Seattle Metropolitan Statistical Areas	)	

DECLARATION OF

HELEN E. GOLDING

on behalf of

AFFINITY TELECOM, INC.
CAVALIER TELEPHONE, LLC
CP TELECOM, INC.
GLOBALCOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
INTEGRA TELECOM, INC.
TDS METROCOM, LLC

August 31, 2007

I, Helen E. Golding, of lawful age, declare as follows:

1. My name is Helen E. Golding; my business address is One Washington Mall, 15th Floor, Boston, Massachusetts 02108. I am Vice President of Economics and Technology, Inc., a research and consulting firm specializing in telecommunications economics, regulation and public policy. My Statement of Qualifications is annexed hereto and made a part of this Declaration. I have previously submitted expert declarations before this Commission.

2. Qwest's case for comprehensive forbearance from core common carrier regulation and fundamental prescriptions of the 1996 Telecommunications Act rests on weak, often irrelevant, and largely anecdotal evidence. Even if the "data" produced by long-time Qwest employees, David Brigham and Robert Teitzel, is accepted at face value, it fails to establish that competition and the interests of consumers can be adequately safeguarded without price-constraining regulation of Qwest's wholesale services, including last-mile loop facilities and interoffice trunking. Rather, to the extent that any comprehensive view of competition can be discerned from Qwest's evidence, it supports the conclusion that Qwest retains its dominant market power in the Phoenix, Denver, Minneapolis-St. Paul, and Seattle MSAs. Indeed, the limited competition Qwest is able to identify is largely attributable to providers that are critically dependent upon the use of Qwest facilities as essential inputs.

3. Although the Brigham/Teitzel declarations contain many numbers, very few of them have any particular relevance to the showings Qwest purports to make. These declarations intermix

their discussions of residential/mass market and business/enterprise competition, when, in reality, the competitive alternatives for the two markets are often separate and distinct. Apparently unable to identify any particular measure by which it can be determined nondominant, Qwest throws out miscellaneous bits of information relating to lines, revenues, number of carriers, number of fiber routes, etc. However, the information is presented in an utterly fragmented manner such that the pieces never add up to a complete overview of the telecommunications markets in the four MSAs. Notably, when Qwest provides data on competitor services, it fails to provide the corresponding data on its own services (or vice versa). Through this approach, Qwest artfully obscures the true comprehensive competitive picture – one that would unambiguously reveal Qwest's continued dominance.

Qwest's evidence provides no basis for "cloning" the Commission's findings in the Omaha forbearance proceeding with respect to the four new MSAs where Qwest now seeks to obtain forbearance

4. Qwest's latest round of petitions represent a rather clumsy attempt to "stand on the shoulders" of Qwest's Omaha forbearance petition,[1] suggesting that, given the passage of time, competition can only be more robust in the four new MSAs where it seeks forbearance.[2] While

[1] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the Omaha Metropolitan Statistical Area*, WC Docket 04-223, *Memorandum Opinion and Order*, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), aff'd sub nom. *Qwest Corp. v. FCC*, Nos. 05-1450 et al., 482 F.3d 471 (D.C. Cir. 2007).
[2] Qwest Petition for Forbearance (Denver MSA) at 1; see also, Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Competition in the Denver, Colorado Metropolitan Statistical Area (Brigham/Teitzel Declaration/Denver) at para. 3. In general, each of the four petitions covers the same arguments, with a common order of presentation, as do the accompanying declarations of Qwest employees, Robert Brigham and David Teitzel.

there have been some changes in the mix of telecommunications services utilized by consumers during the intervening two years, these changes have not substantially diminished Qwest's dominance over local exchange service.

5. Qwest also conveniently ignores the fact that the Commission relied on very specific (wire center) data for the relief that was granted in Omaha and that the Commission *rejected* substantial portions of the relief Qwest had proposed.[3] Although Qwest has provided data on Qwest-provisioned CLEC lines by wire center, its submission does not appear to contain any wire center-specific data quantifying either its own lines or competitor facilities. The aggregate data Qwest has put forth is insufficient to justify any determination with respect to the level of competition in any particular wire center. Moreover, even if it did, examining competition at such close range obscures the true competitive picture by failing to account for the effects of network externalities on competitors' viability.

6. Qwest also glosses over the fact that much of the forbearance it had sought for the Omaha market was denied by the Commission, because Qwest failed to show that the presence of various competitors was sufficient to protect consumers in the absence of continued regulatory oversight. Notably, the Commission denied the requested forbearance with respect to several key section 251 obligations, including:

For simplicity, where the argument or evidence is common to each of the petitions/declarations, the page/paragraph number for the Denver submission will be used.

[3] *Omaha Forbearance Order* at paras. 2, 59.

- Loop and transport unbundling obligations in wire centers not specifically proven to have significant competitive alternatives (wire centers where forbearance was granted were the exception, not the rule);[4]
- Resale obligations in section 251(c) (4);[5] and
- The duty to negotiate in good faith with respect to terms and conditions of agreements to fulfill its obligations under sections 251(b) and (c).[6]

The Commission also denied Qwest forbearance from the requirements of section 271(c)(2)(B) – the so-called competitive checklist – except as to loop and transport unbundling in the specific wire centers for which the FCC had granted section 251(b)forbearance, and it denied much of Qwest's request for forbearance from application of dominant carrier regulation, including all regulatory relief with respect to the application of price cap, tariffing, and Section 214 requirements for enterprise services.

7. The Commission's findings in the Omaha proceeding – and the nature of forbearance findings generally – are case-specific.[7] Whether or not Qwest had succeeded in persuading the Commission that competitive conditions in a particular Omaha wire center warranted forbearance, it must produce new, independent, and relevant evidence with respect to the forbearance it has requested for the Denver, Phoenix, Minneapolis-St. Paul, and Seattle MSAs – and it has failed to do so.

[4] *Id.* at paras 59-60.
[5] *Id.* at paras. 37, 57, 84.
[6] *Id.*
[7] *Id.* at para. 4 and footnote 46.

8. Earlier this month, the Commission issued an Order regarding ACS of Anchorage, Inc.'s Petition for Forbearance for various statutory and regulatory obligations with respect to its operations in the Anchorage, Alaska MSA.[8] To the extent that the Commission granted portions of ACS's petition, it is inevitable that Qwest will point to the ACS-Anchorage decision and attempt to draw parallels between the findings in that Order and competitive conditions in Qwest's four MSAs. As discussed later in this declaration, particularly with respect to the conditions that would confront a provider seeking to deploy facilities to business customers, there are key geographic and demographic differences that clearly set the Anchorage ILEC Study Area (essentially the Municipality of Anchorage) apart from the four Qwest MSAs at issue in this proceeding.

Qwest's evidence fails to establish that there is effective competition for either its retail or, more critically, its wholesale services, in the mass market or the enterprise market, within any of the four subject MSAs

9. Qwest's petition addresses mass market and enterprise markets separately and then within each product market discusses competitors by service or technology platform. The Brigham/ Teitzel declarations, which contain the evidence the petitions rely upon, are organized by service/technology, and tend to intermix their analysis of competition in the mass market and

[8] *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area,* WC Docket No. 06-109, *Memorandum Opinion and Order,* FCC 07-149 (August 20, 2007), 2007 FCC LEXIS 6046 ("*ACS Anchorage Forbearance Order*").

enterprise market, as well as retail and wholesale markets. However, regardless of how it structures its presentation, Qwest fails to substantiate that competition throughout the four MSAs will ensure just, reasonable and nondiscriminatory rates, terms, and conditions for all affected customers and that the requested forbearance will promote, rather than hinder, the development of competition.

10. In each of their four declarations, Brigham and Teitzel reel off names and numbers on every page, and they often attempt to enhance the perception that this information has some great competitive significance by classifying it as "confidential." Their allegedly "confidential" information includes such broad and relatively uninformative measures as the number of unaffiliated CLECs offering some unspecified level of service somewhere within an MSA;[9] Qwest's share of residential "connections" and business customer "telecom spending" as reported by TNS[10]; some nearly illegible fiber route maps[11]; and other nominally quantitative tidbits that are largely irrelevant and/or not substantially different than information that could be obtained (at least on a statewide basis) from reports compiled and published by the Commission.

11. Qwest also avoids presenting a comprehensive portrayal of competition in any particular wire center. Thus, for example, "highly confidential" Exhibit 2 contains wire center line counts for competitors' lines provisioned over Qwest facilities, but Qwest's own line counts for those

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[9] Brigham/Teitzel Declarations at paras. Phoenix-21; Denver-21; Minneapolis-23; and Seattle-23.
[10] *Id.* at paras. 6-7.
[11] Brigham/Teitzel, Confidential Exhibit 4 (separate map provided for each of the four MSAs).

same wire centers are not included. And, while Qwest cannot be faulted for not having access to the precise number of lines that competitors (CLECs, cablecos) serve over their own facilities, without substantial dependence on Qwest's loops and switches, as discussed further below, the projections that Qwest makes concerning facilities-based competition are simply not reliable.

12. Whenever Qwest lacks privileged information about its competitors and so must rely on estimates, its methods consistently tend to overstate the strength of such competitors. For example, Brigham and Teitzel reference competitors' business "targets"[12] – numbers that are provided to impress shareholders or analysts, but which have little predictive value and contain even less information about a competitor's existing business. With respect to competitor services provided over high-capacity special access lines, Qwest makes the wholly unwarranted assumption that each 64 kbps of capacity in the circuit purchased is being sold as a single voice-grade circuit.[13]

13. Qwest also produces an estimate of residential and business lines served over CLEC facilities based on competitor white pages listings. Qwest discloses that it "does track the number of white pages listings, by rate center, of CLECs that are facilities-based (those utilizing CLEC-owned switches and loops, such as Comcast, and/or those utilizing CLEC-owned switches and unbundled loops or Special Access services purchased from Qwest)." The fact that

[12] Brigham/Teitzel Denver and Minneapolis Declarations at para. 18; see also, Brigham/Teitzel Seattle Declaration at para. 16.
[13] Brigham/Teitzel Denver Declaration at para. 32 and footnote 101.

Qwest feels entitled to use this information to advance the Company's interests – when the information was provided by competitors with an expectation that it would be used solely for provisioning of their services – is, in and of itself, evidence that Qwest is not ready to be relieved of its obligations as a dominant carrier.[14]

14. Substantively, Qwest makes the assumption that CLEC customers (in each of the four MSAs) choose to be listed in the white pages at the same rate as Qwest's nationwide customer base (in the respective product market).[15] However, it provides no rationale for assuming that CLEC customers in each of the four MSAs are requesting listings at the same rate as Qwest's own customers throughout its ILEC region. More importantly, it is not at all clear what the number that Qwest derives from this exercise actually represents or that it is an accurate estimate of competitors' facilities-based service.

15. According to the description, Qwest's estimate is based on the white pages listings associated with any CLEC who provisions service in any of the following ways: (1) exclusively over its own facilities *OR* (2) using a CLEC switch combined with a Qwest loop *OR* (3) using Qwest special access.[16] Since only the first of these three service arrangements involves

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[14] Brigham/Teitzel Denver Declaration at para. 23. Qwest admits to using its privileged knowledge of directory listings originated by CLECs on behalf of customers that they serve on a facilities basis – confidential information that Qwest obtains exclusively because of its ILEC status. As such, the use of this information for Qwest's own corporate ends raises concerns under section 222(b), which prohibits a carrier from using another carrier's proprietary information for any use other than fulfilling the provisioning carrier's service obligations.
[15] Brigham/Teitzel Denver Declaration at para. 23.
[16] *Id*.

competitor-owned facilities exclusively, by Qwest's own admission, these lines are not necessarily provisioned without reliance on Qwest wholesale services. Moreover, while the estimate purports to measure "CLEC" competition, the description makes clear that it that it also includes types of service that Qwest's declarations and petition treat as separate and distinct sources of competition – i.e., telecommunications offered by cable companies and services provisioned using Qwest special access. Finally, a literal reading of Brigham and Teitzel's declaration suggests that they have used *all* of the listings by any CLEC who provided service to *some* of its customers in whole or in part over the CLEC's own facilities. This description would apply to virtually all CLECs and would also include listings for customers that such CLECs served *entirely* over Qwest facilities. However, the **[begin confidential]** <******>**[end confidential]** business lines and **[begin confidential]**<*******>**[end confidential]** residential lines that Qwest derives from its white pages listing analysis are significantly less than the total lines for which Qwest admits to providing CLECs with unbundled loops (with or without switching). If this evidence is as Qwest describes it, the only conclusion that can be drawn is that, contrary to Qwest's assertion, CLECs have no facilities-based lines. Alternatively, if one assumes that Qwest has inaccurately described its analysis and has in fact only analyzed a portion of the listings that could not be directly accounted for through wholesale sales of Qwest loop/switching or loop facilities, the numbers that Qwest provides still make little sense.

[Begin highly confidential]

Table 1 Comparison of aggregate Qwest wholesale services furnished to CLECs for use in serving business customers with Qwest's estimate of total retail CLEC customers				
	Denver	Phoenix	Minneapolis	Seattle
UNE-L				
EEL				
QPP				
UNE-P				
Resale				
TOTAL of Qwest-provided wholesale lines to CLECs				
B/T Estimate of retail CLEC business lines				
Source: Brigham/Teitzel decls, paras. Denver-25, Phoenix-23, Minneapolis-25, Seattle-25; HIGHLY CONFIDENTIAL Exhibit 2.				

[End highly confidential]

In the context of discussing special access service – which can be (but is not always)[17] used by competitors as a substitute for unbundled network elements – Qwest discloses the amount of special access that it sells to competitors in each of the four markets. In fact, Qwest sells quite a lot of special access in each of these four markets:

[17] A significant portion of Qwest special access is provided to wireless carriers that use these services to interconnect cell sites with their switching offices and to interconnect their switching offices with wireline local and long distance carrier networks. A significant portion of special access services associated with enterprise customer accounts are used for various data networking and transmission applications.

[Begin confidential]

Table 2

Wholesale Special Access Services provided by Qwest (VGEs)

	Denver	Phoenix	Minneapolis	Seattle
As DS-1s				
As DS-3s				
As Ocn's				
TOTAL				

Source: Brigham/Teitzel declarations, paras. Denver-32, Phoenix-32, Minneapolis-35, Seattle-35.

[End confidential]

While Qwest's purposes in documenting these quantities of special access use may have been to highlight the amount of competition it confronts (since, presumably, most or all customers of special access services are Qwest competitors), what these figures more accurately demonstrate is the extreme level of dependence of those competitors upon Qwest for the underlying services they need in order to compete at the end-user level. In fact, even carriers that are putatively "facilities-based" still require at least *some* special access services:

- CLECs that have deployed fiber to individual commercial buildings require special access in order to serve locations where no CLEC-owned fiber has been deployed, in order to offer their enterprise customers single-source responsibility for the customers' data (and voice) networks.

- Wireless carriers are heavily dependent upon the use of special access to provide connectivity between their individual cell sites and their switching offices, and between the switching offices and local and long distance public switched telephone networks.
- Even cable MSOs, which offer IP-based voice telephony over their own last mile facilities, may still be dependent upon Qwest special access to interconnect their cable head-ends with private IP transport networks and with the public Internet.

The massive quantities of special access that Qwest is providing in each of these four MSAs provides compelling evidence of the extent to which even the "intermodal competitors" cited by Qwest – cable and wireless – are fundamentally dependent on Qwest for their ability to compete in these four markets.

16. Finally, Qwest's evidence shows nothing about how the competition would constrain its prices for wholesale services it seeks to have deregulated and that are essential inputs to the retail services of many competitors. The only other facilities-based provider with widely deployed facilities – the cable company – is not required to unbundle its services or sell them on a wholesale basis, subject to the pro-competitive framework imposed on ILECs by the 1996 Telecommunications Act. Thus, even where cableco provides mass market customers with a duopoly for retail service – a condition that is not in the long run conducive to competition – the wholesale market remains Qwest's alone.

Qwest's continued dominance with respect to the mass market

17. Despite the appearance of "line loss" among its residential base, Qwest remains dominant in wireline telephony throughout the four MSAs. In fact, virtually all of its "lost" lines can be accounted for by either growth in its own broadband connections or by facilities it continues to provide on a wholesale basis. Upon closer scrutiny, it is also evident that while the offerings available to residential customers have become more diverse, the use of intermodal options – particularly wireless – is frequently not a substitute for Qwest's services, but merely a complementary addition. Finally, Qwest's exclusive focus on the residential customer fails to address the other segment of the Commission's mass market classification – small business customers – for whom intermodal options are frequently not as widely available or as suitable. CLECs, which remain the primary competitive alternative for these smaller businesses, are largely dependent on Qwest for purchase of the underlying facilities.

18. Qwest maintains that the number of retail residential access lines it serves has declined dramatically over the six years ending in December 2006, and it attributes this drop to competitive losses. Qwest's analysis does not account for the substitution of broadband service obtained from Qwest itself for customers' second lines. As the Commission is aware, in the mid-to-late 1990s (the period immediately prior to the one analyzed by Qwest), consumer access to the Internet was achieved primarily via dial-up connections, and large numbers of consumers obtained a second residential access line specifically for this purpose. This produced a temporary

and historically anomalous spike in residential access line counts.[18] Thus, FCC data shows that, in 2000, one-fifth (26.2 million) of the 126.4 million residential access lines in service were secondary lines.[19]

19. Following 2000, as higher speed "always on" ADSL and cable modem services became more generally available, consumers substituted one or the other of these Internet access arrangements for their second dial-tone access line. Not surprising, as of 2005, the count of secondary lines had declined by more than 50%, to 12.1-million while the count of high speed replacement lines (ADSL and cable modem) has increased from 3.2-million in 2000 to 51.1-million in 2006.[20] The following table summarizes the relationship between the gain in high-speed Internet access and the decline in residential dial-tone lines between 2000 and 2006, based upon FCC data, for the four states containing the MSAs in Qwest's forbearance petitions:

[18] Demand for additional residential access lines grew from 3.9-million in 1990 to 26.2-million in 2000. But by 2005, the number of additional residential access lines had dropped back to only 12.1-million. Industry Analysis and Technology Division, Federal Communications Commission, *Trends in Telephone Service*, February 2007, Table 7.4.

[19] *Id.*

[20] FCC, Industry Analysis and Technology Division, *High-Speed Services for Internet Access; Local Competition Report: Status as of June 30, 2006* and *Trends in Telephone Service*, February 2007 at Table 2.1.

Table 3 **Comparison of decline in residential dial-tone access lines (millions) with gain in residential high-speed Internet access service** **2000-2006**				
	WA	**AZ**	**MN**	**CO**
ILEC Res switched access lines – 2000	2.99364	2.38056	2.20125	2.16525
ILEC Res switched access lines – 2006	2.0958	1.44755	1.61383	1.54768
Decrease 2000-2006	0.89784	0.93301	0.58742	0.61757
High-speed Res Internet access lines 2000	0.196	0.154	0.118	0.105
High-speed Res Internet access lines 2006	1.575	1.393	1.058	1.166
Increase 2000-2006	1.379	1.239	0.94	1.061
Sources: FCC, Industry Analysis and Technology Division, *Local Competition Reports,* December 2000 and June 2006*; High-Speed Services for Internet Access: Status as of June 30, 2006.*				

20. Thus, for example, while the number of ILEC lines in Arizona decreased by 930,000 between 2000 and 2006, high-speed Internet access lines increased by over 1.24 million. Similarly, in Minnesota, the 587,000 decrease in dial tone lines was more than offset by the 940,000 gain in high speed Internet access lines. In each of the four states, the increase in broadband access lines significantly exceeded the drop-off in ILEC dial-tone lines. Moreover, although some of the growth in high-speed Internet access is associated with cable modem service, Qwest's ADSL service represents a large share of the growth. For example, Qwest notes that, as of June 2006, only "41% of the broadband access lines in Colorado were served by cable modem"[21] – in other words, the majority of broadband-connected households, as many as 59%, were using Qwest ADSL. Despite its contentions that it has "lost" lines due to competitive

[21] Brigham/Teitzel Denver Declaration at para. 44. Comparable figures are 55% for Arizona (para. 43); 49% for Minnesota (para. 47); and 46% for Washington (para. 47).

inroads, Qwest did not submit evidence in this record to support its claim, and the data that is available indicates that competitive losses were not anywhere near as extensive as Qwest would have the Commission believe. Qwest's attempts to attribute the entirety of the decrease in residential access lines to "competition" for residential voice seems clearly off the mark since the "competition" in question is in many cases against another service offered by Qwest itself.

21. Qwest also seeks to minimize its dominance in the provision of residential local services by relying upon line share data provided by TNS. The TNS methodology, however, has several critical limitations. First, it focuses solely upon the *retail* service provider, ignoring altogether the actual provider of the underlying service. From TNS' perspective, CLEC services that are furnished using Qwest resale services, UNEs, or the post-UNE-P Qwest Platform Plus ("QPP") are all attributed to CLEC shares, not to Qwest. Second, TNS makes no distinction between a household's primary telecommunications service – which is still highly likely to be the Qwest wireline connection – and other network access connections, such as wireless phones. Thus, for a family of 4 that has 3 cell phones, a Comcast broadband connection, and Qwest wireline local exchange service, Qwest's nominal share of residential "connections" would be calculated at 20% using TNS' math. Family plans, often with nominal charges for additional users, have made it increasingly likely that each family member (certainly by the time they reach adolescence) will have a wireless phone, even when – as is true in the vast majority of cases – the family maintains its primary wireline connection with the ILEC.

22. It turns out that virtually all of the increase in non-Qwest connections can be accounted for by growth in demand for wireless services and residential broadband. Taking again the example of Denver, Qwest’s TNS connections shares are reported as follows: “[i]n fourth quarter 2000, TNS reported that Qwest's share of residential customer connections in the Denver MSA was **[begin confidential]**<***>**[end confidential]**. By fourth quarter 2006, Qwest's share of residential communications connections in the Denver MSA had declined to **[begin confidential]**<***>**[end confidential]**.”[22] Importantly, the TNS “connections” analysis tells one nothing about consumers’ *substitution* of cable, broadband and wireless services for Qwest dial tone access lines. Indeed, inasmuch as the growth in total “connections” in all four MSAs grossly exceeds the population growth in these markets, the correct conclusion is that consumers are simply purchasing more services – different services – from a variety of sources.

Table 4
Colorado ILEC “connections” shares as of 2006

Service	Total Quantity	ILEC Quantity	Share	ILEC share	Source
Wireline service	2,805,000	2,276,358	39.35%	31.93%	FCC Local Competition Report, January 2007, at Table 7
Wireless	3,442,000		48.29%	0%	Brigham/Teitzel, para. 36.
ADSL	404,989	404,989	5.68%	5.68%	“High-Speed Services for Internet Access: Status as of June 30, 2006, FCC IATD, Wireline Competition Bureau, January 2007
Cable modem	476,463		6.68%	0%	
TOTALS	7,128,452	2,681,347	100.00%	37.61%	

[22] Brigham/Teitzel Denver Declaration., at para. 6. As Table 4 shows, it is possible to use publicly available FCC data to derive the same types of “connections” shares, the results of which are fairly consistent with the putatively “confidential” TNS data. For the year 2000, using the same public data that is the source for Table 4 below, the ILEC share is 60%.

23. Early in its petition and declarations, Qwest claims that the drop in the number of lines it serves is even more significant because, during the same time frame, the population (households) in each of the four MSAs increased. According to Qwest, the confluence of these two conditions supports its claim that alternative technologies are gaining strength among consumers and, in so doing, diminishing Qwest's dominance. However, the TNS connection data exposes the fallacy in this reasoning. Whereas Qwest implies that competitors are obtaining a growing share of the pie, this is not the case. Rather, the "total connections" pie being measured by the TNS data is growing – and it is growing at a far greater rate than the increase in households. As shown on Table 5, between 2000 and 2006, the increase in the number of connections in Colorado (47%) was nearly six times the growth in population (8%) reported by Qwest.[23] This dramatic increase in connections is inconsistent with Qwest's theory that customers are substituting intermodal services for Qwest's wireline exchange and exchange access services; rather it suggests that intermodal competitors (including those whose services are being carried over Qwest's own broadband offering) offer Qwest customers complementary service and are primarily adding new capabilities, rather than replacing their ILEC services. The analysis of data for Arizona, Minnesota and Washington revealed the very same pattern of dramatically increased connections.[24]

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[23] It is also likely that while many households experiment with the reliability and quality of VoIP service over a broadband connection, they also continue to maintain a wireline connection with the incumbent.

[24] The comparable "connections" growth percentages for Arizona, Minnesota and Washington based upon the methodology displayed in Table 4 above are 57%, 45% and 43%.

Table 5

Analysis of Colorado ILEC "connections" growth 2000 to 2006

Service	2000	2006	Change	% Change	Source
Wireline telephone service	3,120,903	2,805,000	-315,903	-10.12%	FCC Local Competition Report, January 2007, at Table 7
Wireless	1655000	3,442,000	+1,787,000	+107.98%	*Id.*, at Table 14.
ADSL (Note 1)	30,704	404,989	+374,285	+1219.01%	"High-Speed Services for Internet Access: Status as of June 30, 2006, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, January 2007
Cable modem (Note 1)	30,704	476,463	+445,759	+1451.79%	
Total Connections	4,837,311	7,128,452	+2,291,141	+47.36%	

24. Qwest's declarants Brigham and Teitzel observe that the populations of each of the four MSAs have been increasing – in Denver, for example, households grew by 13% since 2000, with total population growing by Qwest's declarants Brigham and Teitzel observe that the populations of each of the four MSAs have been increasing – in Denver, for example, households grew by 13% since 2000, with total population growing by Qwest's declarants Brigham and Teitzel observe that the populations of each of the four MSAs have been increasing – in Denver, for example, households grew by 13% since 2000, with total population growing by 8% over that same period. Yet as Table 5 above indicates, Denver MSA "connections" grew by some 47% over that same period. Brigham and Teitzel juxtapose the decrease in Qwest access lines against

the increase in total population as indicative of consumers' substitution of these new technologies – wireless and broadband – for Qwest wireline access lines. But with population growing by only 8% while "connections" grew by 47% over the same period, the correct conclusion is that consumers are *not* substituting these services for Qwest access lines; rather, consumers are simply purchasing more services overall across a broader array of technologies, with far more consumers viewing wireline access, wireless, and broadband as *complements* to one another rather than as substitutes for one another, as Qwest suggests. As Table 6 shows, this same pattern – far more "connections" growth than population growth – is characteristic of each of the four MSAs:

Table 6

Growth in Demand for "Connections" Far Outstrips Growth in Population 2000-2006

	Population gain	Household gain	Connections growth
Denver, CO	8%	13%	47.0%
Phoenix, AZ	19%	20%	57.0%
Minneapolis, MN	5%	10%	45.0%
Seattle, WA	9%	7%	43.0%

Source: Population/Household growth: Brigham/Teitzel declarations, at para. 5; Connections growth: Tables 4 and 5 and footnote 24, supra.

25. Brigham and Teitzel's references to consumers who have purportedly "cut the cord" by substituting wireless for wireline cannot support their contention that wireless is a meaningful "competitor" to wireline, beyond the marginal (between 6% and 12% or so, according to the

September 29, 2006 FCC CMRS report[25]) share of consumers who may have adopted this solution. However, that still means that in excess of 90% of all wireless users have both a wireless and a wireline phone, and clearly *do not* view their wireless phone as a substitute for wireline service.

26. Qwest also relies on TNS data with regard to its claim that the strength of Qwest's competition is evidenced by the drop in Qwest's share of retail revenues over the six-year period ending December 2006. As with line counts, the TNS revenue share numbers are not reliable evidence of a weakening in Qwest's dominant ILEC status. TNS gathers information on customers' retail spending, based on their bills. Over the six years in question, Qwest may have lost some of its retail revenues from local exchange and exchange access services, but, at the same time, its wholesale revenues were growing. Similarly, the retail revenues of Qwest's competitors do not reflect what they pay to Qwest for the underlying special access, UNEs, or other wholesale services. For these reasons, a "share" analysis based on retail revenues alone does not support Qwest's contention that it has lost significant market power.

27. The TNS "connections" figures refer solely to *retail* market shares, and give no effect whatsoever to the actual provider of the underlying service. If we confine the "connections"

[25] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 06-17, 21 FCC Rcd 10947 (2006) at para. 205.

analysis for Colorado solely to wireline services and include in the ILEC column both the retail and wholesale ILEC lines, we get a far more accurate picture of Qwest's dominance in the Colorado market:

Table 7 **Analysis of Colorado ILEC retail and wholesale Wireline "connections" shares as of 2006**				
Service	Total Quantity	ILEC Quantity	ILEC share	Source
Wireline telephone service – retail	2,805,000	2,276,358	81.15%	FCC Local Competition Report, January 2007, at Table 7
Wireline telephone service – wholesale		336,142	11.98%	Id., at Table 11
TOTALS	2,805,000	2,612,500	93.1%	

28. Whenever Qwest attempts to focus exclusively on changes in its share of retail lines, it distorts the competitive picture by failing to account for its own role as the overwhelmingly dominant supplier of the underlying wholesale services. It is misleading to characterize the drop in retail local exchange service lines – or the associated revenues – as "competitive losses" when the services associated with many of these alleged losses continue to be provided over Qwest-owned facilities (via resale, UNEs or its UNE-P replacement offerings, Qwest Platform Plus ("QPP"), recently replaced by Qwest Local Services Platform ("QSLP"). An examination of Qwest's *wholesale* share, *i.e.*, including the lines Qwest uses for its own retail service along with

the resold and UNE lines for which Qwest is the underlying service provider, demonstrates that Qwest controls fully 80 to 95% of switched facilities across all four states.

Table 8
ILEC share of underlying switched access line services
(millions)

	AZ	**CO**	**MN**	**WA**
ILEC retail switched access lines	2.227	2.276	2.273	2.994
ILEC resale switched access lines	.152	.093	.123	.090
ILEC UNEs	.167	.243	.281	.251
TOTAL ILEC switched access lines	2.546	2.612	2.677	3.335
CLEC-owned lines	.651	.193	.272	.165
TOTAL switched access lines	3.197	2.805	2.949	3.500
ILEC share	79.6%	93.1%	90.8%	95.3%

Source: FCC, Industry Analysis and Technology Division, *Local Competition Report: Status as of June 30, 2006.* Data is statewide ILEC data, and may include some non-Qwest ILEC lines.

Notes: Figures may not add due to rounding.

29. Moreover, even the intermodal options that Qwest identifies are also dependent on Qwest facilities. Notably, wireless carriers are major users of ILEC special access and transport facilities. VoIP customers require a broadband access connection to originate calls (and switched access for PSTN termination of calls).

30. Regarding the role of cable telephony, while there is no fundamental dispute that cable companies offer a competitive alternative to Qwest's retail service at residential homes passed by video distribution systems within the four subject MSAs, Qwest's evidence regarding cable telephony is insufficient to justify the broad deregulation it is proposing. Even where the cable video distribution systems appears to cover the entire MSA – and this is not uniformly true of all four geographic areas[26] – they are still relative newcomers as providers of residence local telephone service, particularly as to their VoIP-based service platform. As is clear from the Commission's Omaha decision, the coverage and penetration of cable offerings varies significantly from wire center to wire center.[27] Qwest's own evidence makes clear that cable companies are only gradually building their subscribership for digital voice service. Even if the Comcast nationwide growth forecasts cited by Qwest are reliable and even if the facilities in Seattle, Denver, and Minneapolis are being deployed at approximately the same pace as the nationwide expansion, the forecasts still show that Comcast's VoIP offering (Comcast Digital Voice) is far from fully rolled out.[28]

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[26] For example, Qwest acknowledges that Comcast's coverage does not extend to areas that include more than 1/6 of its wire centers in the Minneapolis-St. Paul MSA. Brigham/Teitzel Minneapolis Declaration at para. 14.

[27] See, *Omaha Forbearance Order* at para. 60; significantly, equivalent detailed evidence has not been submitted in the record of the current proceeding.

[28] Unlike Verizon and AT&T, neither Qwest nor any of the cable MSOs operating in the 4 MSAs has a wireless affiliate. Yet, in an attempt to make its competition appear more robust, Qwest describes *plans* of "Comcast and other cable providers" to add wireless service to their offerings. Noting that Comcast has begun offering Sprint Nextel wireless service in Boston and Portland, Qwest implies that Denver and Minneapolis-St.Paul may be among the markets for expansion of this offering. Brigham/Teitzel Denver and Minneapolis-St. Paul Declarations, at paras. 19 and 20, respectively. Based on this possible, future deployment, Qwest goes on to quote Comcast marketing hype about the advantages of an expanded bundle. This kind of speculation cannot possibly form the basis for

31. And, lastly, Qwest provides no evidence concerning either the availability or the suitability of cable telephony services for the needs of small to medium sized businesses. This is a critical market segment that is often overlooked, falling at the intersection of the residential and large enterprise customers. These customers have fewer intermodal options than residential customers and less likelihood of being offered any facilities-based competition than the largest enterprise customers. CLECs who seek to offer these customers a competitive choice are nearly always dependent on Qwest for their underlying facilities or services.

Qwest's continued dominance with respect to the enterprise market

32. Qwest's case with respect to competition in the enterprise market is particularly weak and circumstantial. It makes much of the sophistication of enterprise customers; however, the sophistication of enterprise customers and their awareness of their competitive options cannot create any options that do not actually exist. Qwest also relies upon the popular but unproven notion that the enterprise market will always be the beneficiary of higher levels of competition than mass market service. Qwest's appeal to this popular misconception is directly contradicted by evidence that has been repeatedly brought to the Commission's attention by large business customers with regard to special access competition and both the unavailability and unsuitability

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forbearance.

of cable facilities to meet enterprise customer needs.[29] Moreover, the competitive options available to enterprise customers have shrunk rather than expanded in recent years, with the industry consolidation represented by the acquisition of AT&T and MCI and the bankruptcy of several next-level competitors.

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[29] *See, e.g.*, Comments of AdHoc Telecommunications Users Committee (Jan. 22, 2002) at 2-3, *filed in Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001); Comments of AdHoc Telecommunications Users Committee (Mar. 1, 2002) at 14-17, filed in *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001); Reply Comments of AdHoc Telecommunications Users Committee (Jul. 1, 2002) at i, *filed in Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* CC Docket Nos. 02-33, 95-20, and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); Comments of AdHoc Telecommunications Users Committee (Dec. 2, 2002) at 5, *filed in AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593; Comments of AdHoc Telecommunications Users Committee (Jun. 30, 2003) at 6, *filed in Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003); Reply Comments of AdHoc Telecommunications Users Committee (September 23, 2004) at 3-14, filed in *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005); Reply Comments of Ad Hoc Telecommunications Users Committee (May 10, 2005), *filed in SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65; Reply Comments of AdHoc Telecommunications Users Committee (May 24, 2005) at pp. 8-23, filed in *Qwest Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75; Comments and Reply Comments of AdHoc Telecommunications Users Committee (June 13, 2005 and July 29, 2005), filed in *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); Comments of AdHoc Telecommunications Users Committee (February 22, 2006), filed in *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunset Pursuant To 47 U.S.C. § 160*, WC Docket No. 05-333 , Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Mar. 16, 2006).

33. As with mass market services, a large amount of retail enterprise market competition being relied upon by Qwest as the basis for forbearance is dependent on Qwest's wholesale services. As with mass market service, Qwest again engages in a great deal of double-counting. For example, Qwest discusses competitive fiber, systems integrators, and special access as though they were three distinct forms of competition – which, of course, they are not. Competitive fiber may well be a component of services provided by systems integrators. Both, however, are largely dependent on Qwest special access facilities – which Qwest counts as a separate form of "competition."

34. The method used by Qwest to estimate enterprise customer lines served over special access on the basis of "voice grade equivalents" also tends to exaggerate the CLECs' competitive gains. The comparison of switched access lines to what are represented as "special access lines" is misleading because, whereas most switched access lines represent discrete physical subscriber loops running between the ILEC wire center and the customer's premises, each "special access line" is only a unit of bandwidth capacity expressed in DS-0 (i.e., 64 kbps) equivalents. Typically, special access involves a physical facility capable of carrying bandwidths ranging from a minimum of 24 voice grade equivalents (DS-1), 672 VGEs over a DS-3, up to as many as 129,024 VGEs (OC-192). However, prices do not vary proportionately with bandwidth capacity. For example, going from a single OC-3 line (2,016 VGEs) to an OC-12 (8,064 VGEs) increases the circuit capacity (which Qwest expresses as VGEs) by 300%, at as little as a 5% to 10% price

increase. Because of this pricing, a CLEC would rationally choose to serve a customer that required 2100 lines with an OC-12, leaving surplus (non-revenue-generating) circuit capacity that Qwest would count as roughly 6,000 additional VGEs. Of course, special access is still a Qwest service, and the fact that CLECs use special access for even very high-capacity connections to enterprise customers validates the conclusion that competitors are frequently dependent upon Qwest and unable to justify the deployment of their own last-miles facilities based on prevailing costs and revenue opportunities. Thus, it is hardly surprising that Integra has reported that ILEC facilities were the only facilities present at almost 95% of the buildings it surveyed during random customer service calls in the Phoenix, Minneapolis, and Seattle areas.[30]

35. With respect to intermodal alternatives, Brigham and Teitzel again lump mass market and enterprise services together when, in reality, the intermodal alternatives available to enterprise customers are different and in many respects more limited that for residential customers. However, as with residential customers, when enterprise customers do employ new technologies, it is typically to obtain complementary capabilities and not as a substitute for their extensive wireline telecommunications requirements. Not surprisingly, Qwest does not allege that "cord cutting" is occurring to any significant extent in the enterprise market and provides no evidence that wireless service is responsible for any of the purported line losses attributed to business customers.

[30] See, Declaration of Geoffrey Williams, Integra Telecom, Inc. at p. 2

36. Qwest relies heavily on the "presence" of cable operator networks in the four MSAs as evidence of competition in the enterprise market. Qwest's petition extracts "sound bites" from the *Omaha Forbearance Order* and strings them together in an attempt to create the appearance that the Commission had previously accepted the cable company's motivation to serve business customers, together with the cable company's "scale and scope," as a basis for granting forbearance. This is not and should not be the case.

37. Cable telephony is primarily a mass market service – relying on facilities deployed to provide consumers at-home video services. Cable penetration has traditionally been reported based on "homes passed." All that Qwest is able to say about competitive position of cable companies with regard to serving business customers pertains to their *interest* in serving this market. It comes from trade press or cableco promotional materials – sources that focus on predictions and image-making, not factual descriptions. While cable companies may recognize an attractive revenue opportunity in serving enterprise customers, the lack of existing facilities means that they would need to make large expenditures to add such customers. In this regard, cable companies have few if any advantages over other wireline CLECs and, in fact, some significant disadvantages. Qwest provides no specific evidence whatsoever about the actual extent of cable service to enterprise customers in any of the four MSAs because, unlike CLEC data, it has no inside information to share, and it certainly provides no evidence to back up its

claim that the cable company in any of the four MSAs has a "nearly ubiquitous network and therefore possesses 'the necessary facilities to provide enterprise services.'"[31]

38. In fact, even to the extent that it is credible, Qwest's evidence regarding cable's plans for the business market cuts against its contention that cable companies pose an imminent competitive threat. For example, with respect to the Denver and Minneapolis markets, Qwest notes that Comcast's "target" is to capture 20% of the business market over the next five years.[32] However realistic or unrealistic this "target" may be (a lot can happen in the telecommunications industry in a five year period), this marketing projection strongly suggests that Comcast has nowhere near this level of market penetration at present and is certainly not in possession of "nearly ubiquitous" facilities capable of serving enterprise customers.

39. As alluded to earlier, it is probable that Qwest will play up the recent decision with respect to ACS in Anchorage, where the Commission pointed to significant competition from the municipality's cable provider, GCI, in granting forbearance that extended to retail special access services. However, the conditions in Anchorage are far from typical. As shown in Exhibit 1, Anchorage has a highly compact urban area; its entire downtown business district covers roughly one square mile (including park land, vacant lots, and a large municipal cemetery) out of the

[31] Qwest Denver Petition at p. 22 (fragment quoted from *Omaha Forbearance Order* at para. 66).
[32] Brigham/Teitzel Denver and Minneapolis Declarations at para. 18; see also, Brigham/Teitzel Seattle Declaration at para. 16.

roughly 2,000-square mile area for the Anchorage municipality.[33] ACS's principal competitor – and apparently the only *facilities-based* competitor – in the enterprise market thus confronted a very limited build-out that involves considerably less investment and time to complete than would apply in any of the four Qwest MSAs. Moreover, even in Anchorage, it is instructive to recognize that the ILEC still confronts only *one* facilities-based competitor, notwithstanding the comparatively lower entry barrier involved in a network overbuild in Anchorage vis-à-vis the other, considerably larger and more geographically expansive markets for which Qwest seeks forbearance. In his separate statement, Commissioner McDowell expressly noted the unique conditions extant in Anchorage, and recognized that these may not prevail elsewhere:

> The Anchorage, Alaska study area is a unique market, where the incumbent local exchange carrier, ACS, faces significant facilities-based competition from other carriers, primarily General Communication Inc. (GCI). For instance, GCI purportedly has over one-half of the exchange access market and 60 percent of the high-speed Internet market in Alaska. In addition, the geographic location of Anchorage contributes to the special characteristics of that market that are not duplicated in any other market in the country.

40. Thus, any conclusions that might apply to the cable company's or other facilities-based carriers' ability to extend facilities to serve non-residential customers (i.e., customers not already "passed" by a video system) within this extremely limited footprint are clearly inapplicable to

[33] Exhibit 1 consists of two maps, one detailing land use in the downtown study area and the other showing downtown Anchorage within the context of the surrounding area. The maps were obtained from the web site of Municipality of Anchorage, Planning Department, at www.muni.org/planning/CBD_CompPlanPHD_Mar07.cfm (accessed August 30, 2007).

Denver, Seattle, Minneapolis-St. Paul (which has two downtowns, in addition to significant suburban business development), or Phoenix.

Qwest's descriptions of the "coverage" of competitor facilities are vague and largely irrelevant

41. In various recent Commission proceedings, ILECs have produced maps purporting to illustrate that their competitors have extensive facilities within a particular geographic area. In the *Triennial Review Proceeding*, SBC's filing included maps that showed both CLEC fiber routes and SBC special access connections into buildings in particular urban centers in its region. Although intended by SBC as evidence of CLECs' competitive strength, ETI pointed out that what the maps really demonstrated was how dependent most enterprise customers - and the competitive carriers that serve them - were on SBC special access facilities. Even though SBC's maps did not identify locations at which enterprise customers were obtaining service at retail directly from SBC (thus presenting an inflated view of the CLEC fiber share), ETI was nevertheless able to use the SBC maps to determine the relative use of CLEC fiber and SBC special access by CLECs serving enterprise customers. This analysis, illustrated on the table below, shows the overwhelming use of ILEC special access to connect to buildings even on streets where CLEC has installed their own fiber:

Table 9
CLEC use of ILEC special access to serve enterprise customers despite deployment of CLEC-owned fiber

City	**All Locations**		**Buildings served by SBC Spec. Access on streets with CLEC fiber**
	Buildings served by SBC Spec. Access	Buildings served by CLEC fiber	
San Francisco (city-wide)	1160	71	658
San Francisco (financial dist)	718	68	436
Oakland	181	18	111
San Diego	95	24	63
Dallas	124	27	109

Source: *SBC Communications Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Docket No. 05-65, SBC/AT&T response to the FCC Staff's April 18, 2005 Initial Information and Document Request, item 6.

42. Perhaps seeking to avoid these criticisms, in its recent forbearance petitions, Verizon submitted "confidential" maps that were significantly less detailed than the SBC maps (that were available on the public record). Verizon's maps showed CLEC fiber routes throughout the MSA, but contained detail on CLEC "lit buildings" in only a small portion of the MSA.

43. Qwest has apparently decided that an even more effective tactic is to ensure that its maps contain no useful information whatsoever. None of Qwest's exhibits contain maps showing CLEC facilities in any detail within the respective MSAs. The "confidential" maps submitted by Qwest (Confidential Exhibit 4 to the Brigham and Teitzel Declarations with respect to each of the four MSAs) consist of small, nearly illegible drawings which it claims show the "coverage"

of competitive fiber throughout the MSA. The scale of these drawings is so small that they appear simply as a tangle of lines. It is impossible to identify any particular streets or buildings. There is no way of telling whether any competitor has a relatively comprehensive network or whether the lines represent numerous providers, each of which has small fragments of coverage.

44. Qwest's filing also includes cable "coverage" maps. These maps are equally vague and unsuitable for the purpose Qwest offers them in this proceeding. Leaving aside their complete lack of geographic detail, the maps were not produced for purposes of showing anything about cable telephony. They show video service coverage, not necessarily the geographic area where the cableco's telecommunications offerings are available. Similarly, information noted on the exhibits with respect to "cable households" (e.g., Brigham/Teitzel Minneapolis Declaration, Exh. 1, p. 1, "Comcast Spotlight, Twin Cities - Coverage Map) clearly refers to video programming subscribers. With regard to the "coverage" itself, since cable companies have traditionally obtained their local franchise in exchange for a commitment to build out their systems to serve a community's residential customers, there is no reason to conclude that cable facilities suitable to the needs of enterprise customers are even deployed along the streets where they are located, no less to their specific buildings or customer premises.

Conclusion

45. For all of its statistics, Qwest does not present a coherent overview of market conditions in Phoenix, Denver, Minneapolis-St. Paul, and Seattle that could provide the basis for the several competitive findings the Commission must make in order to grant the requested forbearance. Potential, future, or aspired-to competition is not sufficient, nor is it relevant that Qwest may serve fewer retail lines or derive less revenue from its retail business customers than in past years. In the final analysis, Qwest's evidence does not show that effective competition has developed *throughout* any of the four MSAs for retail or wholesale, mass market or enterprise services or even *within* any one or more specific wire centers within any of these MSAs.

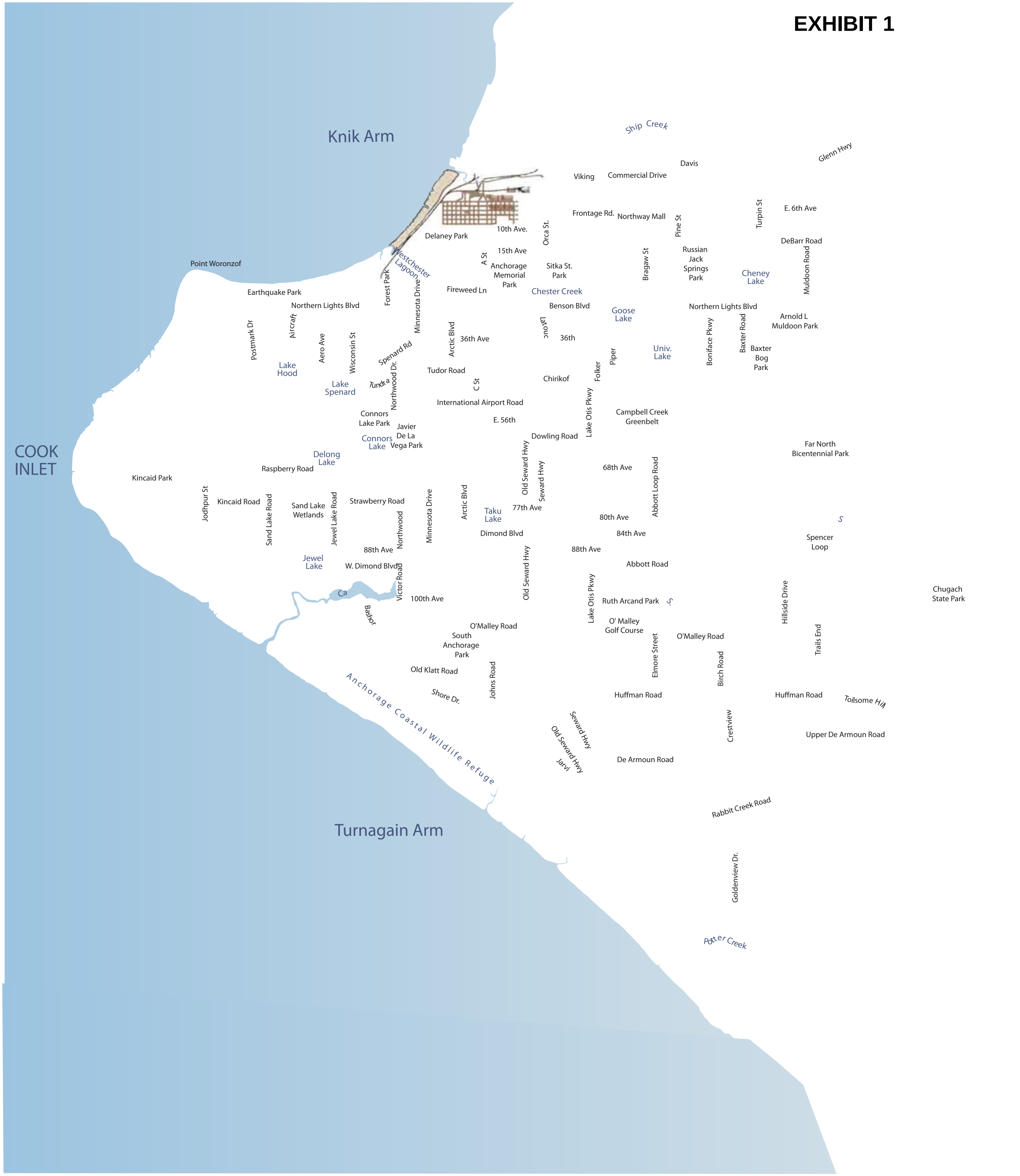
The foregoing statements are true and correct to the best of my knowledge, information and belief.

Helen E. Golding

Helen E. Golding

Exhibit 1
Maps of Anchorage
Central Business District

EXHIBIT 1



Legend

Downtown Study Area | Parks and Open Space | Primary Roads and Highways

Major Water Bodies | Mud Flats | Railroad

N

Diagram 1.1 Regional Context

anchorage
DOWNTOWN COMPREHENSIVE PLAN

Map prepared by MIG, Inc.

EXHIBIT 1

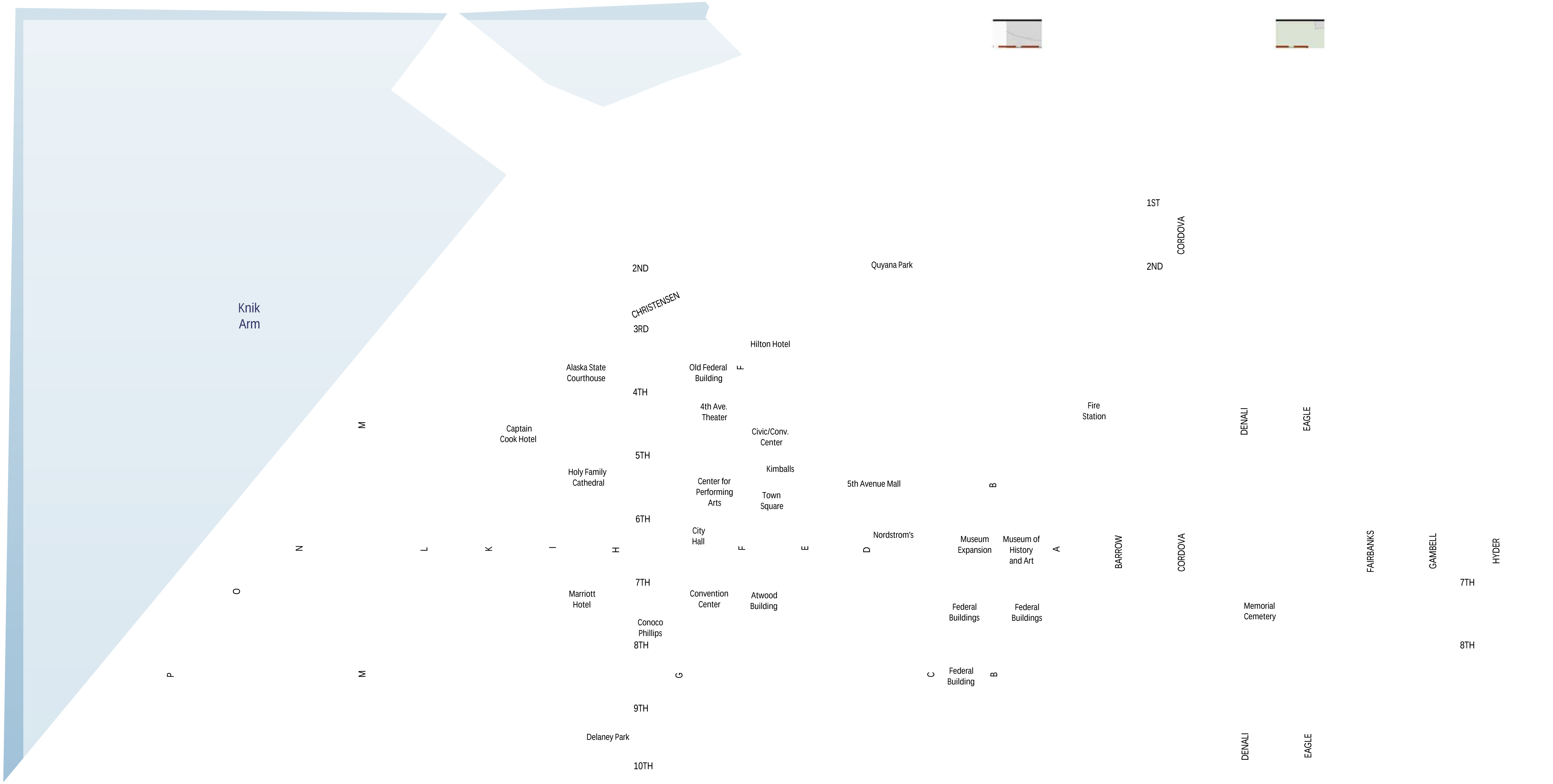


Diagram 3.1
Existing Land Use

N

0 275' 550' 825'

Legend

Commercial	Single Family	Park	Parking Lot
Industrial	Two Family	ROW/Road	Parking Structure
Institutional	Multi-Family	Vacant	

Statement of Qualifications

HELEN E. GOLDING

Helen E. Golding, Vice President in ETI's Regulatory Policy Group since 1994, has worked for thirty years in the field of utility regulation and public policy. In the public sector, she has worked at both state and federal regulatory agencies; she also has extensive private sector experience in the areas of telecommunications law, strategic planning, and regulatory policy. In addition to her extensive telecommunications industry experience, Ms. Golding has considerable experience in the public policy and law of the energy industry.

Ms. Golding's most recent work at ETI has concentrated on Canada's comprehensive evaluation of its regulatory frameworks for wholesale and retail telecommunications services, the FCC's evolving policies concerning broadband, Internet-related services, and service providers, including policies on Voice over Internet Protocol services, and matters involving state taxation of telecommunications and information services. During the past several years, she has also focused on economic and public policy issues related to the FCC's Triennial Review Proceeding and TRO Remand, special access competition, and market-based mechanisms for spectrum allocation.

Following the passage of the landmark *Telecommunications Act of 1996*, Ms. Golding directed work at ETI to evaluate the progress of various Bell operating companies (BOCs) toward meeting the standards of Section 271 of the *Act*. She also directed work analyzing the propriety of Ameritech's application for authorization by the Illinois and Michigan public utilities commissions to provide local exchange service through the same separate subsidiary that Ameritech proposed to employ to provide interLATA long distance services. Along with Dr. Lee L. Selwyn, Ms. Golding submitted a comprehensive statement as evidence in the Canadian Radio and Telecommunications Commission's investigation into forbearance from regulation of toll services provided by the Stentor companies, Canada's equivalent of the pre-divestiture Bell System.

Ms. Golding has done extensive work in the area of telecommunications industry mergers, and is the co-author of two affidavits to the FCC addressing the public interest concerns raised by the SBC-Ameritech and GTE-Bell Atlantic mergers, submitted on behalf of a coalition of state consumer advocates. Ms. Golding was also a key participant in ETI's participation in several state proceedings reviewing major ILEC mergers, on behalf of consumer advocates in Maine, Ohio, California and Hawaii.

Ms. Golding has directed or had substantial involvement in multiple projects involving the original specification or subsequent revision of alternative regulation plans, including work for consumer advocates in Colorado, Connecticut, Indiana, Maine, and Massachusetts. Ms. Golding participated in local competition dockets in New York, New Jersey, Massachusetts, and Hawaii, and in various state proceedings focusing on universal service. She also contributed heavily to numerous submissions to the Federal-State Joint Board and FCC in CC Docket 96-45, the Universal Service proceeding, and various phases of the FCC's LEC Price Cap Review proceedings.

Ms. Golding was Assistant General Counsel of the Massachusetts Department of Public Utilities from November 1988 to September 1992. Ms. Golding managed a staff of hearing officers, who conducted adjudicatory and rulemaking proceedings for all regulated utilities. Her position required case management and policy coordination with the Department's numerous technical divisions (organized by industry sector: telecommunications, electric, gas, water, and transportation). Ms. Golding also served as the Commission's chief legal advisor on matters that spanned the Department's broad utility jurisdiction. In addition to overseeing numerous rate cases for all utilities, these proceedings included the tariffing of new services, design of conservation and load management programs, incentive and competitive rates, licensing, financing, siting and utility management practices.

Immediately prior to joining ETI, Ms. Golding was in the Regulatory Practice Group at Rubin and Rudman, a mid-sized Boston law firm, where she specialized in communications, energy, and municipal law, for clients that included communications and cable companies, municipal electric companies, independent power producers, and public authorities.

Prior to becoming Assistant General Counsel at the DPU, Ms. Golding was Regulatory Counsel and Manager of Telecommunications Public Policy for Honeywell, Inc., providing legal and strategic planning advice concerning rate and regulatory developments affecting the company as a large user of telecommunications service and as a computer manufacturer. In that position, she also provided counsel on tariff and regulatory matters to the company's alarm and customer premises equipment businesses.

Ms. Golding also worked at the Federal Communications Commission, as a General Attorney in the Common Carrier Bureau, Tariff Division, where she was responsible for tariff review and rulemaking proceedings for domestic and international telecommunications services. After interning with the Department of Public Utilities during her final year of law school, Ms. Golding joined the Department’s new Telecommunications Division as a Telecommunications Specialist. Among her responsibilities were matters pertaining to the Department’s regulation of radio common carriers and coordination with the CATV Commission on rates, terms, and conditions for pole attachments.

Ms. Golding is a graduate of Boston University School of Law (J.D., 1977 and Bryn Mawr College (A.B. *cum laude*, 1974).

Publications of Helen E. Golding

The BCM [Benchmark Cost Model] Debate, A Further Discussion, (with Dr. Lee L. Selwyn and Susan M. Baldwin). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, May 1996.

The Phone Wars and How to Win Them, (with Susan M. Baldwin). *Planning*, July 1996 (Volume 62, Number 7).

Interpreting the Telecommunications Act of 1996 Mandate for the Deployment of Advanced Telecommunications Services in a Fiscally Responsible and Fully Informed Manner (with Susan M. Baldwin), *Proceedings of the Tenth NARUC Biennial Regulatory Information Conference*, Volume 3, September 11-13, 1996

U.S. Regulatory Safeguards: Implications for Canada, Evidence submitted in Canadian Radio and Telecommunications Commission docket CRTC 96-26: Forbearance from Regulation of Toll Services Provided by Dominant Carriers, November 22, 1996.

Report on the Southern New England Telephone Company (SNET), (with Patricia D. Kravtin, et al.), prepared for Cablevision Systems Corporation, July 1997.

The "Connecticut Experience" with Telecommunications Competition: A Case in Getting it Wrong, (with Lee L. Selwyn and Susan M. Gately), February 1998.

Affidavit of Susan M. Baldwin and Helen Golding, submitted on behalf of Consumer Groups in FCC Docket CC 98-141, SBC-Ameritech Merger Proceeding, October 15, 1998.

Affidavit of Susan M. Baldwin and Helen Golding, submitted on behalf of Consumer Groups in FCC Docket CC 98-184, Bell Atlantic-GTE Merger Proceeding, December 18, 1998.

Bringing Local Telephone Competition to Massachusetts, (with Lee L. Selwyn) prepared for the Massachusetts Coalition for Competition Telephone Service, January 2000.

Market-based Solutions for Realigning Spectrum Use in the 800 MHz Band, (with Lee L. Selwyn), June 2003.

Competition in Access Markets: Reality or Illusion, (with Lee L. Selwyn and Susan M. Gately) prepared for the Ad Hoc Telecommunications Committee, August 2004.

Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition (with Lee L. Selwyn and Hillary A. Thompson), prepared for the National Association of State Utility Consumer Advocates, April 2005.

Intercarrier Compensation in a Diverse Competitive Environment, (with Lee L. Selwyn) prepared for Pac-West Telecomm, Inc. and US LEC Corp., May 2005.

Avoiding the Missteps Made South of the Border: Learning from the US Experience in Competitive Telecommunications Policy (with Lee L. Selwyn), prepared for MTS Allstream Inc., August 2006.

Special Access Overpricing and the US Economy: How Unchecked RBOC Market Power is Costing US Jobs and Impairing US Competitiveness, with Lee L. Selwyn, Susan M. Gately, and Colin B. Weir, prepared for the AdHoc Telecommunications Users Committee, August 2007.

ATTACHMENT 2

FIRST DECLARATION OF GEOFFREY WILLIAMS, INTEGRA TELECOM, INC.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petitions of Qwest Corporation	)	
for Forbearance Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and	)	
Seattle Metropolitan Statistical Areas	)	

FIRST DECLARATION OF GEOFFREY WILLIAMS

1. My name is Geoffrey Williams. I am a Product Manager and Developer of Integra Telecom, Inc. ("Integra"). My business address is 1201 Lloyd Blvd, Portland, Oregon, 97232. I joined Integra in October 1995 through the acquisition of Electric Lightwave. I have more than 28 years experience in telecommunications design, development, sales, and operational support. I have factual knowledge relating to the information discussed in this Declaration. The purpose of this Declaration is to describe a recent study conducted by Integra concerning the presence of competitive provider facilities in buildings in which Integra customers are located.

2. Integra recently conducted a survey of single and multi-tenant office buildings in several cities in the Qwest region, including Minneapolis, Phoenix, and Seattle to ascertain how many non-ILEC networks are typically physically present at these buildings. Denver was not included because Integra does not provide service there. During June 2007, whenever an Integra technician visited a building for any reason, such as change of service or technical issues, in which an Integra customer was located the technician noted, when it was possible to determine, which providers had a fiber presence to the building. The total buildings surveyed are approx-

imately 1% of all buildings in which Integra has customers, but close to 100% of buildings that technicians visited during the month of June 2007.

3. The results of this survey were that in Minneapolis only 4 out of 61 buildings visited were served by competitive fiber; in Phoenix 3 out of 55 buildings were served by competitive fiber; and in Seattle 12 out of 217 buildings had competitive fiber.

4. This survey reflects my experience that there are very few commercial buildings in these MSAs that have competitive facilities and that nearly all of the providers at the buildings surveyed are dependent on ILEC facilities to provide their services.

5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 31, 2007

Geoffrey Williams

ATTACHMENT 3

DECLARATION OF DAVID BENNETT, INTEGRA TELECOM, INC.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petitions of Qwest Corporation	)	
for Forbearance Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and	)	
Seattle Metropolitan Statistical Areas	)	

DECLARATION OF DAVID BENNETT

1. My name is David Bennett. and I am Senior Vice President of Engineering and Corporate operations of Integra Telecom, Inc. ("Integra"). My business address is 1201 NE Lloyd Blvd., Suite 500, Portland, Oregon 97232. I joined Integra in 1999 and I have more than 38 years of experience in telecommunications, engineering and operations. I have factual knowledge relating to the information discussed in this Declaration. The purpose of this Declaration is to demonstrate the lack of alternatives to BOC facilities to the vast majority of end user customer locations.

2. It is Integra's policy to rely on its own telecommunications network facilities for provision of service wherever possible. In a very few instances Integra has its own fiber loops extending to customer premises. Integra has either built its facilities or acquired them from other carriers.

3. It is my experience that it is never economically feasible for Integra to build loops at the DS0, DS1, or DS3 capacity level to customer premises because the revenue will, in all but a few rare exceptions, not be adequate to recoup the investment costs and provide a return on investment. Difficulty in obtaining the necessary rights-of-way or building access in a timely manner to accomplish the construction of the direct connection typically creates a barrier to self-

provisioning loops even in the rare instance where it may be economically feasible to make the initial investment to serve a particular premise.

4. Integra has a preference to obtain facilities from competitive providers whenever it is economically infeasible for Integra to construct facilities. Integra purchases services from ILECs only as a last alternative. However, it is my experience in every market in which it operates that Integra is rarely able to obtain raw copper facilities or DS0, DS1 and DS3 level access from competitors. Integra must obtain facilities from ILECs either as UNEs or special access where it is unable to construct facilities, or obtain them from competitors.

5. ILEC special access and "commercial" offerings do not provide a realistic business alternative for obtaining most transport and loop facilities for the reasons stated in Integra's recent comments in WC Docket No. 05-25.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 30 2007

ATTACHMENT 4

SECOND DECLARATION OF GEOFFREY WILLIAMS, INTEGRA TELECOM, INC.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petitions of Qwest Corporation	)	
for Forbearance Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and	)	
Seattle Metropolitan Statistical Areas	)	

SECOND DECLARATION OF GEOFFREY WILLIAMS

1. My name is Geoffrey Williams. I am a Product Manager and Developer of Integra Telecom, Inc. ("Integra"). My business address is 1201 Lloyd Blvd, Portland, Oregon, 97232. I joined Integra in October 1995 through the acquisition of Electric Lightwave. I have more than 28 years experience in telecommunications design, development, sales, and operational support. I have factual knowledge relating to the information discussed in this Declaration. The purpose of this Declaration is to describe a recent study of customer churn conducted by Integra.

2. Integra surveyed customers that between July 2006 through June 2007 had switched to other providers. The customers were in six states in which Integra operates including Minnesota and Washington. While the greater Phoenix Arizona MSA is now a served by Integra, we omitted it from this research because it is a very new market to Integra and we are still doing market analysis and network re-configuration that would make a churn analysis skewed.

3. The results of the survey show that of those customers who switched from Integra to another telecommunications provider and for whom Integra was able to identify the new

provider, only approximately 12% switched to a cable operator. Approximately 81% switched to an ILEC or to a another CLEC that, to the best of my information and belief, uses ILEC wholesale facilities. The survey also showed one of the lowest churn rates in the industry and high customer satisfaction with Integra's services.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 31, 2007

Geoffrey Williams